

AGREED RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921

No. 38

CHARLES F. HUNT, EXECUTOR OF THE ESTATE OF
WILLIAM WEIGHEL, DECEASED, APPELLANT,

vs.

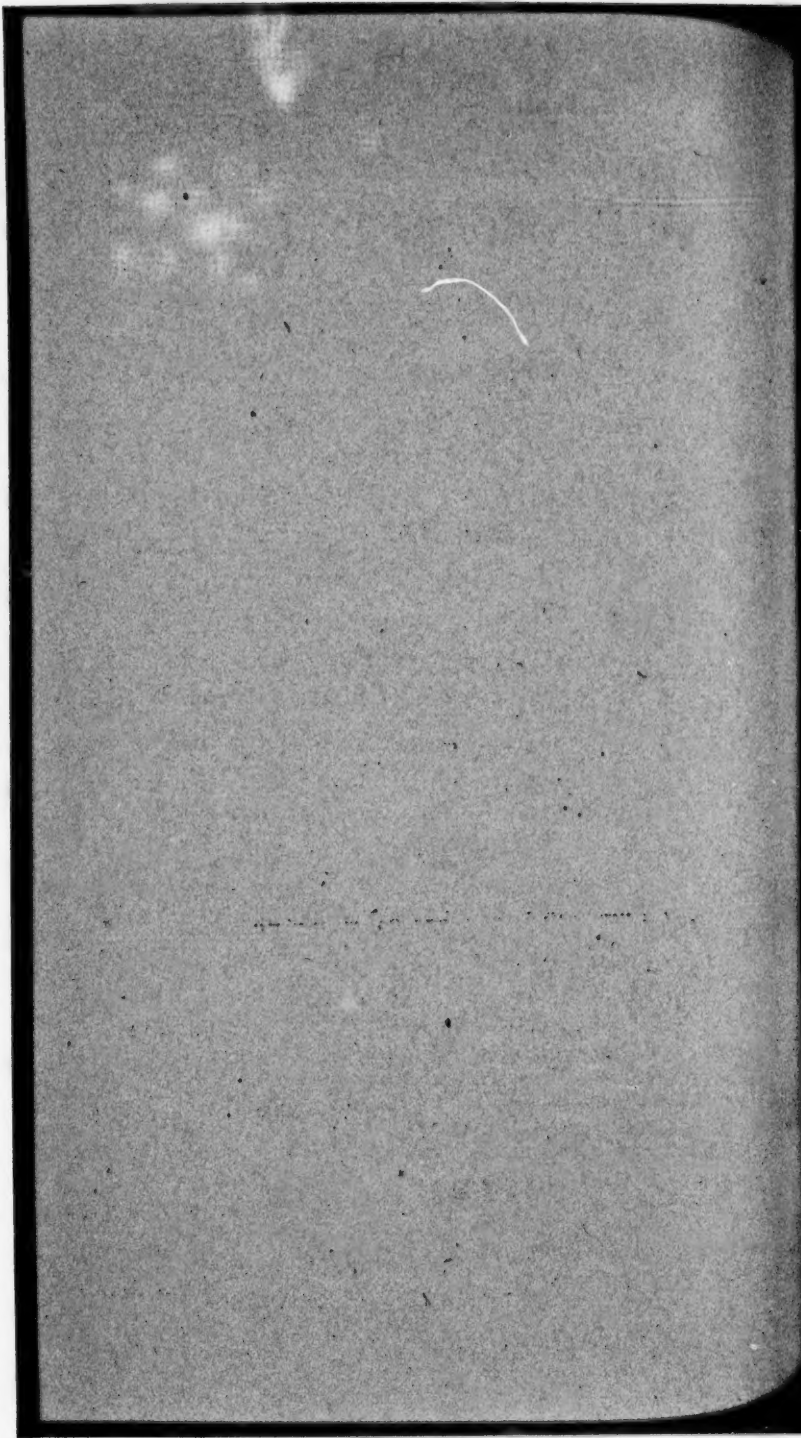
THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

RECORD FILED APRIL 27, 1922.

AGREED RECORD FILED AUGUST 4, 1922.

(27,838)



(27,636)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 313.

CHARLES F. HUNT, EXECUTOR OF THE ESTATE OF
WILLIAM WEIGHHEL, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original.	Print.
Petition	1	1
Exhibit A—Post Office order, September 15, 1894.....	10	6
B—Post Office order, November 14, 1895.....	36	11
C—Post Office order, May 12, 1896.....	38	12
D—Post Office order, May 27, 1896.....	39	12
E—Post Office order, February 27, 1897.....	40	12
F—Bill of particulars in the claim of William Weighhel	41	13
History of proceedings.....	46	13
Substitute for the amended petition.....	47	14
Exhibit 1—Subcontract for Route No. 235,001.....	62	23
2—Authority to bring suit.....	67	27
3—Letter, Young to Travis, November 14, 1899..	68	28
Demurrer to petition and substituted petition.....	105	28
Argument and submission of demurrer.....	105	28
Opinion of the court on demurrer.....	106	29

	Original.	Print.
History of further proceedings.....	110	32
Amended petition.....	111	32
Exhibit A—Post Office order, September 15, 1894.....	120	38
B—Post Office order, November 14, 1895.....	146	43
C—Post Office order, May 12, 1896.....	148	45
D—Post Office order, May 27, 1896.....	149	46
E—Post Office order, February 27, 1897.....	150	46
Amendment to amended petition.....	156	48
Exhibit G—Extract from report of Postmaster General....	158	49
Argument and submission of case.....	171	61
Findings of fact.....	172	61
Conclusion of law.....	174	64
Opinion of the Court by Hay, J.....	174	64
Judgment of the court.....	177	66
Claimant's application for an allowance of an appeal.....	178	66
Certificate of clerk.....	178	67
Stipulation as to record on appeal.....	180	67

I. *Petition—Exhibits A, B, C, D, E, F.*

Filed April 18, 1901.

In the Court of Claims.

No. 22532.

WILLIAM WEIGHEL, Claimant,

v.

THE UNITED STATES.

Petition.

Filed April 18, 1901.

To the Honorable the Court of Claims:

The petition of William Weighel represents:

1. That he is a citizen of the United States and a resident of the city of San Francisco, in the State of California.

2. That on September 15, 1894, the Postmaster-General of the United States published an advertisement inviting proposals for covered regulation wagon mail messenger, transfer, and mail station service, at Cincinnati, Ohio, Cleveland, Ohio, Columbus, Ohio, Toledo, Ohio, Chicago, Illinois, and several other cities, from July 1, 1895, to June 30, 1899, in which advertisement the said service in Chicago was designated as Route No. 235,001. A copy of such portions of said advertisement as relate to the service in said city of Chicago is hereto attached, as a part hereof, and marked "Exhibit A."

3. That your petitioner was the lowest bidder for said service on Route 235,001 in said city of Chicago, and entered into a contract for the performance of the same, with the Postmaster-General, from July 1, 1895, to June 30, 1899, said contract being in the form and upon the conditions as prescribed in said advertisement. See Exhibit "A" herewith.

4. Your petitioner further shows that at the time when said advertisement inviting bids for contracts for carrying the mails by regulation wagons on Route 235,001 in the said city of Chicago was issued, and at the time when the said contract with your petitioner was so made, and at the beginning of said contract term, to wit, on the first day of July, 1895, and during the continuance of said contract term, there were in existence in said city of Chicago, by direction and order of the Postmaster-General, four certain street railway mail routes, known and designated respectively as route number

335,003, from the city post-office to Station "E," on which route the mails were carried by the West Chicago Street Railroad Company; route number 335,004, from the city post-office to Station "G," on which route the mails were carried by the West Chicago Street Railroad Company; route numbered 335,005, from the city post-office to Station "B," on which route the mails were carried by the North Chicago Street Railroad Company, and route numbered 335,006 (previously being numbered 135,136), from the city post-office to Station "N," on which route the mails were carried by the Chicago City Railway Company.

5. Petitioner further shows that along and on said Route 335,003 there were sub mail stations known and designated as Stations "C," "D," and "E," on Route 335,004, Stations "A" and "B," and on Route 335,006 (previously 135,136), Stations "L," "M," and "N." That the mail sent out from the city post-office to be delivered at and into these various stations was carried previous to November, 14, 1895, from said city post-office to the said city railways at the nearest practicable point on such railways, by the regular employees of the Post-Office Department, and were likewise delivered from the cars of said railways into said stations by such employees; and in like manner the mail to be delivered from one station to another and from the various stations to the city post-office, and other points, was carried from the respective stations to the cars, and from the cars to the city post-office, and from the cars to the station or stations and other points where the same was to be delivered, by the employees of the Post-Office Department.

6. By the terms of the advertisement aforesaid inviting bids for carrying the mail on Route No. 235,001, bidders were directed to inquire of the postmaster, at the city where the service was to be performed, for information relative to the service and its requirements. In pursuance of this instruction, your petitioner, before making the bid as aforesaid, did make inquiry of the then postmaster of said city of Chicago, and, among other inquiries, asked him if any of the service which was then being performed by the employees of the Post-Office Department in carrying the mail to and from the street railway cars aforesaid and the city post-office and the substations, all as above set forth, would thereafter and during the contract term from July 1, 1895, to June 30, 1899, be required of the party or person who should, during such term, be the contractor on said Route 235,001, and was assured by the said postmaster that no such service would be required of the said contractor.

And your petitioner further declares that before making his said bid he learned from the contractor on said Route 235,001 for the contract term from July 1, 1891, to June 30, 1895, that he had been requested by the officers of the Post-Office Department to take up and perform the said service of carrying the mail between the city post-office and the said street cars, and said cars and the said substations along the several street car routes as above described, but that he had refused to do so on the ground that it was not within the terms of his contract by which he engaged to perform

the covered regulation wagon service on said Route 235,001, and upon such refusal he, the said contractor, had not been required to perform the said service and that the Department continued to perform it with its own employes. And pursuant to the assurance made your petitioner by the postmaster of the city of Chicago as herein stated, and the information gathered from the former contractor, as aforesaid, and the information set out in the said advertisement of September 15, 1894, your petitioner made the said bid to perform the service on said Route 235,001.

7. That on or about the 14th day of November, 1895, the Postmaster-General made an order directing your petitioner to perform service as follows (or more frequently, if necessary), without additional pay, alleging the same to be in accordance with the terms of petitioner's contract, to wit: To make twelve trips each week day and three trips each Sunday from the general post-office in said city of Chicago to West Chicago Street Railway at Clark and Madison streets, and the same number of trips from said last-named point back to said general post-office; also twelve trips on each week day and three trips on Sundays from said general post-office to North Chicago Street Railway at Clark and Monroe streets, and the same number of trips from said last-named point back to said general post-office; also twelve trips on each week day and three trips on Sundays from said general post-office to West Chicago Street Railway at La Salle and Madison streets, and the same number of trips from last-named point back to said general post-office; also ten trips each week day and three trips on Sundays from Station "C" to the West Chicago Street Railway at Central avenue and Madison street, and the same number of trips from the last-named point back to Station "C;" also ten trips each week day and three trips each Sunday from Station "D" to West Chicago Street Railway at western avenue and Madison street, and the same number of trips from the last-named point back to Station "D;" also ten trips on week days and three trips on Sundays from Station "E" to West Chicago Street Railway at Fortieth and Madison streets, and the same number of trips from the last-named point back to Station "E;" also ten trips each week day and three trips on Sundays from Station "F" to West Chicago Street Railway at Carpenter and Milwaukee avenues, and the same number of trips from the last-named point back to Station "F;" also ten trips each week day and three trips on Sundays from Station "G" to West Chicago Street Railway at Milwaukee and Western avenues, and the same number of trips from the last-named point back to Station "G;" also ten trips on each week day and three trips on Sundays from Station "A" to North Chicago Street Railway, North Clark and Oak streets, and the same number of trips from the last-named point back to Station "A;" also ten trips on each week day and three trips on Sundays from Station "B" to North Chicago Street Railway at Diversey street and Sheffield avenue, and the same number of trips from the last-named point back to Station "B;" all of which is duly set out in the copy of said order hereto attached and marked Exhibit "B" and made a part hereof.

8. Your petitioner further states to the Court that on or about the 12th day of May, 1896, he received an order in general terms from J. A. Montgomery, the Superintendent of United States Mails at the city of Chicago, directing that on the 18th day of May, 1896, he, your petitioner, should take up the service of carrying the mails to and from the said city post-office and the cars on Cottage Grove avenue,

and to and from Stations "L," "M," and "N," and said cars, 6 the mails being at that time carried on said avenue by the Chicago City Street Railway, and the route being known and designated as route number 135,136 (subsequently numbered 335,006), which said order is hereto attached as Exhibit "C" and made a part hereof.

And that on or about the 27th day of May, 1896, he received through the said Superintendent of Mails a further order from the Postmaster-General signed by G. F. Stone, Acting Second Assistant Postmaster-General, directing your petitioner to make nine trips each week day and four trips on Sundays from Station "L" to the Chicago City Railway, and the same number of trips from the latter-named point back to Station "L;" also to make nine trips each week day and four trips on Sundays from Station "M" to the Chicago City Railway, and the same number of trips from the last-named point back to Station "M;" also to make nine trips each week day and four trips Sundays from Station "N" to the Chicago City Railway, and the same number of trips from the last-named point back to Station "N;" all of which is duly set out in the copy of said order hereto attached and marked Exhibit "B" and made a part hereof.

9. Your petitioner further shows that on or about the 27th day of February, 1897, the Postmaster-General made an order, by the Acting Second Assistant Postmaster-General, directing your petitioner to carry the mail eleven trips on each week day and five trips on Sundays from Station "U" to the West Chicago Street Railway, and the same number of trips from the said last-named point back to Station "U;" also to make eleven trips each week day and five trips on Sundays from the West Chicago Street Railway, at the junction of Madison and State streets, to the Chicago City Railway, at the junction of Madison and Wabash avenues, and the same 7 number of trips from the last-named point back to the West Chicago Street Railway, at the junction of Madison and State streets; all of which is duly set out in the copy of said order hereto attached and marked Exhibit "E" and made a part hereof.

10. That when the aforesaid orders were made, to wit, on the 14th day of November, 1895, the 12th day of May, 1896, the 27th day of May, 1896, and the 27th day of February, 1897, to carry the mail between the city post-office and points on the several street railways, and between the mail stations "A," "B," "C," "D," "E," "F," "G," "L," "M," "N," and "U," and the said railways, the said mails were being carried over said railways, under contracts by the several railway companies with the Postmaster-General, as follows: the mails supplying stations "C," "D," and "E," on and over the West Chicago

Street Railway, and over route numbered 335,003; the mails supplying stations "F," "G," and "U," on and over a line of the same railway, the route being numbered 335,004; the mails supplying stations "A," and "B," on and over the North Chicago Street Railway, the route being numbered 335,005; and the mails supplying stations "L," "M," and "N," on and over the Chicago Street Railway, the route being numbered 335,006.

11. That, upon receiving the said several orders stated in the last paragraph, your petitioner protested against the performance of said service as not being within the terms and conditions of his aforesaid contract to perform the Covered Regulation-Wagon Mail-Messenger, Transfer, and Mail Station Service on route No. 235,001 for the said term from July 1, 1895, to June 30, 1899, and advised the United States, through its proper Department, that for the performance of such service he would claim and demand reasonable compensation.

12. That in pursuance of said several orders and under the terms of the said several protests, your petitioner performed all of said additional service and made all the additional trips hereinbefore set forth, although such services were not within the terms of his contract aforesaid, and they were fairly and reasonably worth, over and above all just credits and offsets, the sums hereinafter set forth in your petitioner's Bill of Particulars, hereto attached as Exhibit "F" and made a part hereof; and your petitioner avers that said claim has not been assigned or transferred by him, and that all of said service was received and accepted by the United States, and by reason thereof there arises on the part of the United States an implied promise to pay your petitioner the reasonable worth of the same.

13. And your petitioner therefore prays judgment against the United States for the sum of \$52,327.

WILLIAM WEIGHEL,

By J. H. McGOWAN,

Attorney for Petitioner.

J. H. McGOWAN,

1419 F St. N. W., Washington, D. C.,

Attorney for Petitioner.

DISTRICT OF COLUMBIA,

City of Washington, ss:

Before me, the undersigned, a notary public, in and for the said District and city, personally appeared J. H. McGowan, the attorney for the claimant therein, who being duly authorized to verify the petition, and who being duly sworn, deposes and says that he has read the foregoing petition by him subscribed, and is acquainted with the contents thereof; that the matters and things therein contained and stated are true, as he verily believes; that the claimant is

justly entitled, as shown in said petition, to the moneys therein
 9 claimed to be due and owing to him from the United States,
 after allowing all just credits and set-offs, and that to the best
 of deponent's knowledge and belief no assignment or transfer of the
 claim therein set forth, or any part thereof, or any interest therein,
 has been made by the claimant to any one whomsoever or by any one
 in his behalf.

J. H. McGOWAN,

Subscribed and sworn to before me this 5th day of March, A.
 D. 1901.

[SEAL.]

ISAAC C. SLATER,
Notary Public.

10-19

EXHIBIT A.

*Proposals for Covered Regulation Wagon Mail Messenger, Transfer,
 and Mail Station Service.*

Post-Office Department,
 Washington, D. C., September 15, 1894.

Proposals will be received at the contract office of this Department
 until 4 P. M. of December 4, 1894, for carrying the mails of the
 United States in the covered regulation wagons prescribed by the De-
 partment, on the routes herein specified, being covered regulation
 wagon mail messenger, transfer, and mail station service in the
 cities hereinafter named, between the post-offices and steamboat
 landings, between the post-offices and mail stations, and between
 the several railroad stations, steamboat landings and mail stations, as
 prescribed herein, for the term from July 1, 1895, to June 30,
 1899, viz:

Cincinnati, Ohio,
 Cleveland, Ohio,
 Columbus, Ohio,
 Toledo, Ohio,
 Chicago, Ill.,

Detroit Mich.,
 Milwaukee, Wis.,
 Minneapolis, Minn.,
 St. Paul, Minn.,
 Kansas City, Mo.,

St. Louis, Mo.

Decisions announced on or before December 21, 1894.

Contracts to be returned to the Department, duly executed, within
 thirty days from date of acceptance of proposals.

(Schedules the same as set forth in exhibit "A" of amended
 petition and exhibits filed June 11, 1918, are omitted here.)

20

Instructions to Bidders.

1. The foregoing schedules show the service, August 15, 1894, as
 near as can be stated. Bidders must inform themselves of the amount
 and character of the service that will be required during the next
 contract term.

The statements of probable additional service that may be necessary on the routes under this advertisement are given so that bidders may be as fully advised as possible of the amount of service likely to be required. It will not, however, limit the liability of the contractors to perform all service that may become necessary, without
21 additional pay.

2. The contractor under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1895, or at any time thereafter during the contract term, whether between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations, now established or that may hereafter be established, whether caused by the establishment of new or by change of site of existing post-offices, railroad stations, steamboat landings, or mail stations within said cities, or caused by the alteration of the routes made necessary for any other reason. Bids must be made with this distinct understanding and must name the amount per annum for the whole service and not by the trip.

3. There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster-General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing a full indemnity to the contractor, one month's extra pay.

4. The Postmaster-General may annul a contract for repeated failures; for violating the postal laws; disobeying the instructions of the Post-Office Department; for refusing to discharge a driver or any person having charge of the mail when required by the Department; for transmitting commercial intelligence of matters which should go by mail contrary to the stipulations herein, or for transporting persons so engaged; whenever the contractor shall become
22 a postmaster, assistant postmaster, clerk in a post-office, or member of Congress, and whenever, in the opinion of the Postmaster-General, the service cannot be safely continued or the laws maintained on the route.

Fines will be imposed for neglect of duty.

5. The Postmaster-General may, in his discretion, continue in force, beyond its express terms for a period not exceeding six months, any contract made under this advertisement until a new contract with the same or other contractors shall be made.

6. The distances given are believed to be substantially correct, but no additional pay will be allowed should they be greater than herein stated. Bidders must inform themselves as to the distances, the running time, the weight of the mails, the condition of hills, streets, toll bridges, ferries, and obstructions of all kinds whereby expense

may be incurred, and as to the probable increase, additional service, or changes likely to be rendered necessary. Claims for additional pay based upon such grounds, or for alleged mistakes or misapprehensions as to the service required, or for bridges destroyed, or ferries discontinued, can not be considered.

7. Foreign mails in transit across the territory of the United States shall, within the meaning of this advertisement, be deemed and taken to be mails of the United States.

8. The transfer service shall include the conveyance of all post-office supplies arriving for the city post-office or for transit through the city.

9. Contractors will be required to convey on the driver's seat of each wagon, whenever necessary, one railway post-office clerk, a substitute, or a messenger.

10. Drivers must be over sixteen years of age, of good moral character, and able to read and write the English language. They must take the oath required by law, and must wear the prescribed cap or hat.

11. All service must be performed in regulation wagons constructed in accordance with the plans and specifications adopted by the Department September 1, 1891. There are four sizes of regulation wagons, viz., the large two-horse wagon, the medium two-horse wagon, the large one-horse wagon, and the small one-horse (or pony) wagon. All of these wagons are to be built with closed bodies. In a few exceptional cases where, in the judgment of the Department, regulation wagons are not necessary, permission may be given to perform a limited portion of the service either in one-horse two-wheel carts or in push carts, built according to plans and specifications furnished by the Department; but these carts must not be used in the performance of service unless specially authorized by the Second Assistant Postmaster-General. Full particulars as to style and construction of wagons required may be obtained on application to the Second Assistant Postmaster-General, Washington, D. C. The wagons must be kept painted and varnished in a thorough manner and ornamented according to specifications. They must be frequently washed and kept clean and in good condition. Only first-class wagons of the prescribed pattern will be accepted. No lettering will be permitted on any part of the wagons other than such as is required by the specifications. The horses used must be suitable for the work, presenting a creditable appearance, and be in first-class condition at all times.

12. When mails are delayed in arrival, wagons must be kept at the depots or landings until the arrival of such mails, and the same be conveyed to the post-office without detention. Except in cases of accident, wagons containing mail must not be opened, or the mails therein contained while in transit. The mails must be carried inside

4 of the wagons and not on the outside or on the seat with the driver, and in no case shall any person be allowed to ride inside of the wagon containing mail.

13. The equipment of the contractor shall be subject to frequent inspections, and the refusal or failure of any contractor to keep his wagons, horses, and harness in good order and appearance, or to furnish proper drivers, so as to perform the service in a style creditable to the Department, shall be sufficient cause for the annulment of his contract and the reletting of the service at his expense.

14. Specifications for cap and hat: Cap—To be of all-wool blue flannel of good quality, three and one-fourth inches high; solid leather fronts one and three-fourths inches deep, with one small regulation P. O. D. button on each side, a silver wreath in front inclosing the words "U. S. Mail," and to have one oiled linen cover. Hat—From June 16 to September 15 of each fiscal year, in lieu of the cap, a straw hat with rim not to exceed three and one-half inches in width and a crown not to exceed four inches in height may be worn. A silver wreath inclosing the words "U. S. Mail" shall be placed on the front of the hat. In severe winter weather the drivers for the contractor will be permitted to wear warm woollen caps of a uniform appearance with regulation badge on front.

15. The wagons, horses, harness, and drivers are to be at all times subject to the approval and control of the postmaster, and the mails are to be taken from and delivered into the post-offices, mail stations, steamboats, and cars at such points and at such hours, under his direction, approved by the Postmaster-General, as will secure proper dispatches and connections, and at the contractor's expense for tolls and ferriage.

16. The number of wagons required must be sufficient, in the opinion of the postmaster, for the prompt and proper performance of the service. The postmaster will also determine which of the sizes of the several regulation wagons mentioned herein will be necessary.

17. The contractor will be required to provide and keep on hand a sufficient number of extra wagons to take the place of those which may be temporarily disabled, delayed, waiting for trains, or withdrawn from service for repairs, or required by the increase of service, so that the service shall always be promptly performed in regulation wagons.

18. Every proposal must be accompanied by a bond, with two or more sureties, approved by the postmaster, and in cases where the amount of the bond exceeds five thousand dollars (\$5,000) the approval must be by a postmaster of the first, second, or third class.

19. Sureties on the bond of a bidder must take an oath before an officer qualified to administer oaths that they are the owners of real estate worth, in the aggregate, a sum double the amount of said bond, over and above all debts due and owing by them, and all judg-

ments, mortgages, and executions against them, after allowing all exemptions of every character whatever. A married woman will not be accepted as a surety, either on the bond of a bidder or upon a contract. Accompanying the bond of a bidder, and as a part thereof, shall be a statement of the sureties under oath, showing the amount of real estate owed by them, brief descriptions thereof, and its probable value, where it is situated, and in what county and State the record evidence of their title exists. Any surety who swears falsely to this statement is deemed by the law guilty of perjury, and is punishable as is prescribed by law for that crime.

20. There should be but one route bid for in a proposal. Consolidated or combination bids ("proposing one sum for two or more routes") cannot be considered.

21. Bidders are cautioned to forward their proposals in time to reach the Department, or to file them, by the day and hour named in this advertisement, as bids received after that time will not be considered. If sent by mail or express, ample time should be allowed for their transit, as they cannot be deemed to be received at the Department until actually delivered at the contract office; neither can bids be considered which are without bond, oath, or certificate required by section 245, act of June 23, 1874, and section 246, act of August 11, 1876. No withdrawal of a bid will be allowed unless the withdrawal is received twenty-four hours previous to 4 P. M., December 4, 1894.

22. No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract.

23. In case of failure of the accepted bidder to execute a contract within the prescribed time, or of the abandonment of service during the contract term, the service will be relet at the expense of the failing bidder or contractor, and any accepted bidder who shall wrongfully refuse or fail to enter into contract in due form, and to perform the service prescribed in his proposal, may be deemed guilty of a misdemeanor, and on conviction thereof be fined and imprisoned therefor.

24. The Postmaster-General reserves the right to suspend the award of contract on any route for a period of not exceeding thirty days after the date fixed in this advertisement, with a corresponding allowance of time for the execution of contract, and to reject all bids on any route whenever in his judgment the interests of the service require it; and also to disregard bids of failing contractors and bidders and also disregard bids accompanied by bonds on which there appears as surety the name of a person who has been declared a failing contractor or bidder, or been barred from bidding for any reason whatever.

25. Postmasters are cautioned, under penalty of removal, not to approve the bond of any bidder before the proposal is completed and the bond is signed by the bidder and his sureties, and not until entirely satisfied of the sufficiency of the sureties. They are also cautioned not to divulge to anyone the amount of any proposal certified to them. Doing so will be sufficient cause for their removal.

26. No postmaster, assistant postmaster, or clerk employed in any post-office shall be a contractor, or concerned in a contract for carrying the mail.

27. Bidders are requested to use the blanks for proposals furnished by the Department, which may be obtained at the post-office on each route herein advertised. For information relative to the service and its requirements, bidders are requested to supply the postmaster at the city where the service is to be performed.

28. Proposals should be inclosed in envelopes, sealed, and superscribed "Proposals for covered regulation-wagon mail-messenger, transfer, and mail-station service, City of —," and addressed to the Second Assistant Postmaster-General, Post-Office Department, Washington, D. C.

The accepted bidder will be required to execute a contract in the following form.

[Form omitted, being the same as the executed contract copy of which is attached to amendment of plaintiff's amended petition.]

36

EXHIBIT B.

Washington, D. C., November 14, 1895

Sir: You are informed that the following order has this day been made in regulation wagon route No. 235,001, Chicago, Illinois:

"Require contractor to perform service as follows (or more frequently, if necessary) without additional pay, in accordance with the terms of his contract."

(Schedule omitted being the same as set forth in like exhibit of amended petition and exhibits filed June 11, 1918.)

37 Permit the contractor to use regulation carts in the performance of this service whenever in the judgment of the postmaster at Chicago, Illinois, such carts can be used advantageously in the service.

Very respectfully,

G. F. STONE,

Acting Second Assistant P. M. General.

Mr. W. Weighel,

Care S. C. Ramage,

No. 409 B street N. E., Washington, D. C.

38

EXHIBIT C.

May 12, 1896.

Mr. E. J. Travis,
U. S. Mail Messenger,
Chicago, Ill.

Sir: I beg to advise you that beginning Monday, the 18th, service between this office and Stations L, M, and N will be performed by Chicago and Cottage Grove ave. R. P. O. as per schedule herewith.

Kindly make the necessary arrangement to have this service begin at the central office and by transfers from Stations L, M, and N, beginning Monday morning.

Respectfully,

J. A. MONTGOMERY,
Supt. of Mails.

39

EXHIBIT D.

Washington, D. C., May 27, 1896.

Sir: You are informed that the following order has this day been made on regulation wagon route No. 235,001, Chicago, Illinois:

"Require contractor to perform service as follows (or more frequently, if necessary) without additional pay, in accordance with the terms of his contract."

(Schedule omitted being the same as set forth in like exhibit of amended petition and filed June 11, 1918.)

Very respectfully,

G. F. STONE,
Acting Second Assistant P. M. General.

Mr. Weighel,
Care of E. J. Travis,
No. 90 W. Congress St.,
Chicago, Illinois.

40

EXHIBIT E.

Washington, D. C., February 27, 1897.

Sir: You are informed that the following order has this day been made:

"From March 3, 1897, require the contractor to perform services as follows (or more frequently, if necessary) without additional pay, in accordance with the terms of the contract."

(Schedule omitted being the same as set forth in like exhibit of amended petition and exhibits filed June 11, 1918.)

Very respectfully,

G. F. STONE,

Acting Second Assistant P. M. General.

Mr. W. Weighel,

Care of E. J. Travis,

No. 90 W. Congress St. Chicago, Ill.

41-45

EXHIBIT F.

Bill of Particulars in the matter of the claim of William Weighel against the United States as set forth in the foregoing petition. In the tables and statements below the letters G. P. O. stand for "General Post Office," and R. P. O. for "Railway Post-Office."

Sufficiently covered by Findings IV.

46

II. *History of Proceedings.*

On August 6, 1907, on motion made therefor and allowed by the Court "subject to objection by the Attorney General, or anyone interested" an amended petition in the name of Ezra J. Travis was filed.

On October 13, 1909, on motion made therefor and allowed by the Court, Messrs. McGowan, Serven & Mohun were substituted as attorneys of record on suggestion of the death of Jonas H. McGowan, the former attorney.

On June 15, 1900, the defendants filed a demurrer to the petition and amended petition.

On August 2, 1911, on motion made therefor, Messrs. Serven & Joyce, were substituted as the attorneys of record.

On February 13, 1912, claimant was granted leave in open court to withdraw and amend petition filed August 6, 1907 and to file an amended substitute petition. Said petition is as follows: Substitute petition for the amended petition filed August 6, 1907, filed February 13, 1912,

47 III. *Substituted Petition for the Amended Petition Filed August 6, 1907.*

Filed February 13, 1912.

In the Court of Claims of the United States.

No. 22532.

EZRA J. TRAVIS, Claimant.

v.

THE UNITED STATES.

Substitute for the Amended Petition Filed August 6, 1907.

To the Honorable the Court of Claims:

The petitioner, the said Ezra J. Travis, files this, his petition, as and for an amendment to the petition heretofore filed in this court, entitled William Weighel v. The United States, No. 22532.

1. Petitioner says that he is a citizen of the United States, and a resident of the city of New York, in the State of New York.

2. That on September 15, 1894, the Postmaster-General of the United States published an advertisement inviting proposals for covered regulation wagon mail messenger, transfer, and mail station service, at Cincinnati, Ohio; Cleveland, Ohio; Columbus, Ohio; Toledo, Ohio; Chicago, Illinois; and several other cities, from July 1, 1895, to June 30, 1899, in which advertisement the said service in Chicago was designated as Route No. 235,001. A copy of such portions of said advertisement as relates to the service in
48 said city of Chicago was attached to the original petition herein, as a part thereof and marked "Exhibit A."

3. That William Weighel was the lowest bidder for said service on Route 235,001 in said city of Chicago, and entered into a contract for the performance of the same with the Postmaster-General, from July 1, 1895, to June 30, 1899, said contract being in the form and upon the conditions as prescribed in said advertisement.

4. Your petitioner further shows that at the time when said advertisement inviting bids for contracts for carrying the mails by regulation wagons on route 235,001 in the said city of Chicago was issued, and at the time when the said contract with said Weighel was so made, and at the beginning of said contract term, to wit, on the first day of July, 1895, and during the continuance of said contract term, there was in existence in said city of Chicago, by direction and order of the Postmaster-General, four certain street railway mail routes, known and designated respectively as route number 335,003,

from the city post-office to Station "E," on which route the mails were carried by the West Chicago Street Railroad Company; route number 335,004, from the city post-office to Station "G," on which route the mails were carried by the East Chicago Street Railroad Company; route numbered 335,005, from the city post-office to Station "B," on which route the mails were carried by the North Chicago Street Railroad Company, and route numbered 335,006 (previously being numbered 135,136), from the city post-office to Station "N," on which route the mails were carried by the Chicago City Railway Company.

5. Petitioner further shows that along and on said route 335,003 there were sub-mail stations known and designated as Stations "C," "D," and "E;" on Route 335,004, Stations "A" and "B;" and on Route 335,006 (previously 135,136) Stations "L," "M," and "N." That the mail sent out from the city post-office to be delivered at and into these various stations was carried previous to November 14, 1895, from said city post-office to the said city railways at the nearest practicable point on such railways, by the regular employees of the Post-Office Department, and was likewise delivered from the cars of said railways into said stations by such employees; and in like manner the mail to be delivered from one station to another and from the various stations to the city post-office and other points was carried from the respective stations to the cars and from the cars to the city post-office and from the cars to the station or stations and other points where the same was to be delivered, by the employees of the Post-Office Department.

6. By the terms of the advertisement aforesaid inviting bids for carrying the mail on Route No. 235,001, bidders were directed to inquire of the postmaster, at the city where the service was to be performed, for information relative to the service and its requirements. In pursuance of this instruction, before making the bid as aforesaid, said Weighel by himself and his agents did make inquiry of the then postmaster of said city of Chicago and, among other inquiries, asked him if any of the service which was then being performed by the employees of the Post-Office Department in carrying the mail to and from the street railway cars aforesaid and the city post-office and the sub-stations, all as above set forth, would thereafter and during the contract term from July 1, 1895, to June 30, 1899, be required of the party or person who should during such term, be the contractor on said Route 235,001, and was assured by the said postmaster that no such service would be required of the said contractor.

And your petitioner further declares that before making his said bid the said Weighel learned from the contractor on said Route 235,001, for the contract term from July 1, 1891, to June 30, 1895, that he had been requested by the officers of the Post-Office Department to take up and perform the said service of carrying the mail between the city post-office and the said street cars, and said cars and the said sub-stations along the several street car routes as above described, but that he had refused to do so on the

ground that it was not within the terms of the contract by which he engaged to perform the covered regulation wagon service on said Route 235,001, and, upon such refusal, he, the said contractor, had not been required to perform the said service and that the Department continued to perform it with its own employees. And pursuant to the assurance made said Weighel by the postmaster of the city of Chicago as herein stated, and the information gathered from the former contractor, as aforesaid, and the information set out in the said advertisement of September 15, 1894, he made the said bid to perform the service as follows (or more frequently, if necessary), without addi-

7. That on or about the 14th day of November, 1895, the Postmaster General made an order directing said Weighel to perform service as follows (or more frequently, if necessary), without additional pay, alleging the same to be in accordance with the terms of said original contract, to wit: To make twelve trips each week day and three trips each Sunday from the general post-office in said city of Chicago to West Chicago Street Railway at Clark and Madison streets, and the same number of trips from said last named point back to said general post-office; also twelve trips on each week day and three trips on Sundays from said general post-office to North Chicago Street railway at Clark and Monroe streets, and the same number

of trips from said last named point back to said general post-office; also twelve trips on each week day and three trips on Sundays from said general post-office to West Chicago Street Railway at La Salle and Madison streets, and the same number of trips from last named point back to said general post-office; also ten trips each week day and three trips on Sundays from Station "C" to the West Chicago Street Railway at Central avenue and Madison street, and the same number of trips from the last-named point back to Station "C," also ten trips each week day and three trips each Sunday from Station "D" to West Chicago Street Railway at Western avenue and Madison street, and the same number of trips from the last-named point back to Station "D;" also ten trips on week days and three trips on Sundays from Station "E" to West Chicago Street Railway at Fortieth and Madison streets, and the same number of trips from the last-named point back to Station "E;" also ten trips each week day and three trips on Sundays from Station "F" to West Chicago Street Railway at Carpenter and Milwaukee avenues, and the same number of trips from the last-named point back to Station "F;" also ten trips each week day and three trips on Sundays from Station "G" to West Chicago Street Railway at Milwaukee and Western avenues, and the same number of trips from the last named point back to Station "G;" also ten trips on each week day and three trips on Sundays from Station "A" to North Chicago Street Railway, North Clark and Oak streets, and the same number of trips from the last-named point back to Station "A;" also ten trips on each week day and three trips on Sundays from Station "B" to North Chicago Street Railway at Diversey street and Sheffield avenue, and the same number of trips from the last named

52 point back to Station "B;" all of which is duly set out in the copy of said order attached to the original petition herein and marked exhibit "B."

8. Your petitioner further states to the Court that on or about the 12th day of May, 1896, he received an order, in general terms, from J. A. Montgomery, the Superintendent of United States mails at the city of Chicago addressed to your petitioner as "U. S. Mail Messenger," directing that on the 18th day of May, 1896, he should take up the service of carrying the mails to and from the said city post-office and the cars on Cottage Grove avenue, and to and from Stations "L," "M," and "N," and said cars the mails being at that time carried on said avenue by the Chicago Street Railway, and the route being known and designated as route number 135,136 (subsequently numbered 335,006), which said order was duly attached to the petition of said Weighel, so numbered 22,532, and marked Exhibit "C."

And that on or about the 27th day of May, 1896, your petitioner received through the said Superintendent of mails a further order from the Postmaster-General, signed by G. F. Stone, Acting Second Assistant Postmaster-General, directing that nine trips be made each week day and four trips on Sundays from Station "L" to the Chicago City Railway, and the same number of trips from the latter named point back to Station "L;" also to make nine trips each week day and four trips on Sundays from Station "M" to the Chicago City Railway, and the same number of trips from the last-named point back to Station "M;" also to make nine trips each week day and four trips Sundays from Station "N" to the Chicago City Railway, and the same number of trips from the last-named point back to Station "N," all of which is duly set out in the copy of said order attached to the original petition and marked Exhibit "D;" said order being addressed to said Weighel in the care of your petitioner herein.

53 9. Your petitioner further shows that on or about the 27th day of February, 1897, the Postmaster-General made an order, by the Acting Second Assistant Postmaster-General, directing that the mail be carried eleven trips on each week day and five trips on Sundays from Station "U" to the West Chicago Street Railway, and the same number of trips from the said last-named point back to Station "U;" also to make eleven trips each week day and five trips on Sundays from the West Chicago Street Railway at the junction of Madison and State streets, to the Chicago City Railway at the junction of Madison and Wabash avenues, and the same number of trips from the last named point back to the West Chicago Street Railway at the junction of Madison and State streets; all of which was duly set out in a copy of said order attached to the petition of said Weighel and marked Exhibit "E."

10. That when the aforesaid orders were made, to wit, on the 14th day of November, 1895, the 12th day of May, 1896, the 27th day of

May, 1896, and the 27th day of February, 1897, to carry the mails between the city post-office and points on the several street railways, and between the mail stations "A," "B," "C," "D," "E," "F," "G," "L," "M," "N," and "U," and the said railways, the said mails were being carried over said railways under contracts by the several railway companies with the Postmaster-General as follows: The mails supplying stations "C," "D," and "E," on and over the West Chicago, Street Railway, and over route numbered 335,003; the mails supplying stations "F," "G," and "U," on and over a line of the same railway, the route being numbered 335,004; the mails supplying stations "A," and "B," on and over the North Chicago Street Railway, the route being numbered 335,005; and the mails supplying stations "L," "M," and "N," on and over the Chicago Street Railway, the route being numbered 335,006.

54 11. That, upon receiving the said several orders stated in the last paragraph, your petitioner protested against the performance of said service as not being within the terms and conditions of aforesaid contract with said Weighel, and advised the United States through its proper Department, that for the performance of such service a reasonable compensation would be claimed and demanded.

12. That in pursuance of said several orders, and under the terms of the said several protests, your petitioner performed all of said extra service and made all the extra trips hereinbefore set forth, although such services were not within the terms of the contract between the Postmaster-General and said Weighel, aforesaid, and they were fairly and reasonably worth, over and above all just credits and offsets, the sums set forth in said Weighel's Bill of Particulars, attached to his petition as Exhibit "F" and made a part hereof; and your petitioner avers that said claim was not assigned or transferred by said Weighel or by himself, and that all of said service was received and accepted by the United States, and by reason thereof there arises on the part of the United States an implied promise to pay your petitioner the reasonable worth of the same. Your petitioner prays the court that all the exhibits from Exhibit "A" to Exhibit "F," inclusive, attached to and made a part of the petition filed by said Weighel, may become a part of this, the substitute for the amended petition. (Reprinted herein, see pp. 133—168.)

13. That after the execution of the contract as set forth in the third paragraph of the petition herein, the said William Weighel did, to wit, on the 6th day of February, eighteen hundred
55 and ninety-five, enter into a sub-contract with the aforesaid Ezra J. Travis, a resident of the city of Chicago, State of Illinois, whereby the said Ezra J. Travis agreed in consideration of the sum of \$70,000 per annum, to transport the mails on said Route 235,001, being covered regulation wagon Mail Messenger Transfer, and Mail Station Service at Chicago, from the 1st day of July, 1895, to June 30, 1899, inclusive, at such times, and upon such schedules, as the Postmaster-General might direct, and in full compliance with the postal laws and regulations, and subject to, and

in compliance with all the requirements of the United States as party of the first part in its aforesaid contract with the said William Weighel. And that in and by the terms of said subcontract, the said Travis, for the faithful performance of the same, did duly bind himself in the sum of \$100,000, and agreed to assume the liability for all fines and deductions imposed upon the said William Weighel, under the terms of his said contract with the United States, for failures and delinquencies in the performance of the service on said Route 235,001, in said City of Chicago for the said term as above set forth, all as duly set out in said contract between the United States and said Weighel. The original of said subcontract is attached hereto and made a part of this substitute for the amended petition (Exhibit 1).

Claimant further shows that at and prior to the execution of the certain subcontract aforesaid, written permission therefor of the Postmaster-General was secured by the said Weighel, and that thereafter claimant advised the Second Assistant Postmaster-General that the copy of said subcontract was not intended to be filed in the Department for recognition by the Department or as a lien against the pay of the contractor as per written letter in that behalf, a true copy of which is as follows:

56

90 West Congress St.,
Chicago, Ill., October 4, 1895.

Hon. C. Neilson,
Second Assistant Postmaster-General,
Washington, D. C.

SIR: This is to certify that the contract existing between myself and William Weighel of San Francisco, California, for Route No. 235,001, being regulation wagon, mail messenger, transfer and mail station service, city of Chicago, State of Illinois, is not intended to be filed for recognition by the Department, or as a lien against the pay of the contractor.

Very respectfully,
(Signed)

EZRA J. TRAVIS,
Subcontractor.

Claimant further shows that thereafter the Department acquiesced in the omission on the part of claimant to file copy of said subcontract in the Post Office Department, and in the correspondence that passed between them in respect of the conduct and operation of the said route under said contract and subcontract recognized claimant as being the lawful subcontractor thereunder; as will more fully appear in and by the certain letters referred to in the amended petition on file herein and hereinbefore referred to and also in the certain further letters, one dated September 1, 1896, addressed to the Second Assistant Postmaster-General and signed by claimant as subcontractor, and another dated August 23, 1899, from the Second Assistant Postmaster-General addressed to claimant as subcontractor, coming under the certain route aforesaid; true and correct copies of each of which said letters are as follows:

San Francisco, Cal., September 1, 1896.

Sir: Following your instructions such extra service as is not covered by the regular contract but is required by the Postmaster at
57 Chicago has been performed, but under protest; and attached letters are copies of the ones sent in to Mr. Montgomery, Supt. of Mail Service at Chicago, and to which your attention is called.

As no response has been received, nor pay for this service, we again hereby respectfully reenter our protest against being required to perform this service without additional pay, for the reasons before given in the letter cited and we earnestly request that we be duly and promptly paid for such service as has already been given up to this time; and that provisions be made for payments for future service of this character.

Very respectfully,

W. WEIGHEL,
Contractor.

E. J. TRAVIS,
Subcontractor.

Hon. Second Asst. P. M. Genl.,
Washington, D. C.

Post Office Department,
Office of Second Assistant Postmaster-General,
Division of Inspection.

Washington, Aug. 23, 1899.

SIR: A fine of \$55.50 has been imposed on the Contractor on Route No. 235,001, in the State of Illinois, for the quarter ended June 30, 1899, 189, because of failures and irregularities as stated below—

Delays in delivering mail to Post Office:

From Chi. M. & St. P., tr. No. 30, 35 min., April 2.....	\$0.50
From Chi. R. I., & P., tr. No. 108, 38 min., April 19.....	.50
From Chi. & E. Ills., tr. No. 6, 30 min. April 22.....	.50
From B. & O., tr. No. 7, 27 min., April 24.....	.50
Carried forward.....	\$2.00
58 Brought forward.....	\$2.00
From Chi. & E. Ills., tr. No. 6, 31 min., May 17.....	.50
From Chi. & Gt. W., tr. No. 2, 45 min., May 22.....	.50
From Board of Trade Sta., due 11.30 a. m., 13 min., June 7.....	.50
From Board of Trade Sta., due 7.45 a. m., 21 min., June 8.....	.50
From Sta. "U," tr. Nos. 22, 27, 28 and 30, 14 to 25 min., June 10.....	2.50
From Chi. & E. Ills., tr. No. 10, 20 min., June 12.....	.50

From Mich. Cent., tr. No. 21, 50 min., June 13.....	.50
From Wabash, tr. No. 9, 30 min., June 16.....	.50
From Wis. Cent., tr. No. 8, 30 min., June 27.....	.50

Failure to make direct transfers:

From C. & N. W., tr. No. 504, to Mich. Cent., tr. No. 36, April 16.....	1.00
From P. F. W. & C., tr. No. 7 (2 loads), to C. & N. W., trs. Nos. 9 and 509, May 4, 11.....	4.00

Failures to make direct transfers:

From C. R. I. & P., tr. No. 6, to Chi. & Gd. Tk., tr. No. 10, May 8.....	1.00
From L. S. & M. S., tr. No. 7, to P. C. C. & St. L., tr. No. 10, May 15.....	1.00
From P. F. W. & C., tr. No. 15 (34 sacks), to C. R. & P., tr. No. 21, May 25.....	1.00
From C. & N. W., trs. Nos. 2 and 50 to Chi. & Streator, tr. No. 13, May 26.....	1.00
From B. & O., tr. No. 7, to Chi. & Lou., tr. No. 3, and Chi. Rich. & Cin., tr. No. 32, May 28.....	1.00
From C. I. & L., tr. 6, to P. F. W. & Chi., tr. No. 6, May 28	1.00
From C. C. C. & St. L., tr. No. 37, to Cottage Grove Ave. R. P. O. trip 2, May 20.....	1.00
From B. & O., tr. No. 47, to C. & N. W., tr. No. 50, and C. C. C. & St. L., tr. No. 12, June 12.....	1.00
Carried forward.....	\$21.50

50 Brought forward.....	\$21.50
From B. & O., tr. No. 5 to Chi. Bur. & Q., tr. No. 11, June 9.....	1.00
From C. M. & St. P., tr. No. 4, to B. & O., tr. No. 8, June 11	1.00
From C. & N. W., tr. No. 8, to A. T. & S. F., tr. No. 9, June 17.....	1.00
From P. C. C. & St. L., tr. No. 19, to C. R. I. & P., tr. No. 11, June 18.....	1.00
From C. R. I. & P., tr. No. 2, to Mich. Cent., tr. No. 14, June 25.....	1.00
From C. & N. W., trs. Nos. 90, 152 and 12, to L. S. & M. S., tr. No. 14, June 29.....	1.00

Failures to disp. mail from G. P. O. & Stations:

60 From G. P. O. by C. R. I. & P., tr. No. 119 (Mail for Auburn Park), May 4.....	1.00
From Station "S" by B. & O., tr. No. 14, May 24.....	1.00
From G. P. O. by Chi. & Erie, tr. No. 2, June 12, 1899....	1.00
Because of depredation committed by Walter Porter and John Newman, drivers, some time previous to June 20, 1899.....	25.00

Total Fine..... \$55.50

This amount will be deducted from your pay as subcontractor on said Route, in accordance with the terms of your subcontract. The right is reserved to make disallowances from future payments for other failures or delinquencies, if any have heretofore occurred, and to correct errors and omissions.

Very respectfully,

W. S. SHALLENBERGER,
Second Assistant Postmaster-General.

Mr. E. J. Travis, •
Subcontractor, Chicago, Ills.:

That the payments for the service for so transporting the mails on said Route 235,001 for the said term were duly made by the
60 United States to said William Weighel. That said Weighel paid to said Travis for said services the said annual sum of \$70,000 as provided in said subcontract, and therefor, paid him nothing more, and declined to bear any of the responsibility or expenses of any of the said services set forth in the said petition; said Weighel further declined to have suit brought in his name for the alleged extra services as set forth, except upon the express condition that "any such suit or suits to be instituted at the sole cost, charge and expense of the said Travis—and not otherwise." This authority, with the condition here stated, is in writing, duly acknowledged before a notary public, and a copy, as Exhibit 2, is attached hereto as a part of this substitute for the amended petition. The limitation of such authority is sought to be added to by the attorney of said Weighel, E. B. Young, in his letter to said Travis of November 14, 1899, transmitting the said written authorization of said Weighel, as follows: "This authority is sent you upon the conditions that you agree to hold and save harmless, Mr. Weighel from all claims or demands of every kind or description that may be made by being made the plaintiff in the suit against the Government, and upon the further condition, as stated in the authority, that any such suit or suits must be at your sole cost, charge and expense." A copy of this letter is hereto attached as a part of this substitute for the amended petition (Exhibit 3).

That all the services alleged in the petition, to which this is an amendment, as having been extra and not provided for by the said contract between the United States and said Weighel, and not paid for by the United States, were performed by said Ezra J. Travis, your petitioner herein, and by no other person, and that all the expenditure and cost made necessary by performing said alleged extra services, were duly and wholly borne by said Travis.

61 14. Your petitioner further states to the court, upon information and belief, that said Weighel, after the beginning of the suit numbered 22,532, became burdened with debts and judgments to large amounts were secured against him, and that he became insane, or imbecile, and, after being a long time confined in an asylum in the State of California, died therein on or about the day of — 190—, by reason of which your petitioner has been uncer-

C. F. HUNT, ETC., VS. THE UNITED STATES.

tain as to the course he might properly pursue to protect his rights in the premises as herein set forth.

15. And, further, your petitioner therefor prays judgment in his favor against the United States for the sum of \$52,327.

EZRA J. TRAVIS,

SERVEN & JOYCE,

Atty. for Petitioner,

1422 F Street, N. W., Washington, D. C.

A. A. HOEHLING, Jr.,

Of Counsel.

DISTRICT OF COLUMBIA.

City of Washington, ss:

Before me, the undersigned, a notary public in and for the District and City aforesaid, personally appeared Ezra J. Travis, who being first duly sworn by me, on oath says that he has read the foregoing amendments to the amended petition herein and is acquainted with the contents thereof; that the matters and things therein stated of his own knowledge are true and those stated upon information and belief he believes to be true.

EZRA J. TRAVIS.

Subscribed and sworn to before me this 13th day of February, A. D. 1912.

META A. FAULCONER,

Notary Public, D. C.

EXHIBIT 1.

(2122.)

Subcontract.

Covered Regulation Wagon Service.

Route No. 235,001. Pay of Subcontractor \$70,000 per annum.

This article of contract, made the 6th day of February, eighteen hundred and ninety-five, between W. Weighel, of San Francisco, County of San Francisco, and State of California, contractor with the United States, party of the first part, and E. J. Travis, of Chicago, County of Cook, and State of Illinois, subcontractor, party of the second part, and Matthew Cullen and Thomas McCoy, of Salt Lake City, Utah, his sureties:

Witnesseth, that whereas the said party of the first part has ex-

cuted a contract with the United States (acting in this behalf by the Postmaster-General), according to law, for transporting the mail on Route No. 235,001, being Covered Regulation Wagon Service at Chicago, State of Illinois, under the advertisement of September 15, 1894, and having obtained conditional permission to sublet the same, has made the following agreement with the said party of the second part, to wit:

The said party of the second part and his sureties aforesaid do jointly and severally undertake, covenant, and agree, and do bind themselves and each of them to and with the said party of the first part in the sum of One Hundred Thousand Dollars, to transport the United States Mail on the said Route No. 235,001, being Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service at Chicago, Ill., from the first day of July, 1895, to June 30, 1899, inclusive, at such times and upon such schedules as the Postmaster-General may direct, and in full compliance with the postal laws and regulations, and subject to and in compliance with all the requirements of the said party of the first part under the said contract with the United States, for Seventy Thousand Dollars per annum.

And it is hereby further agreed that liability for all fines and deductions imposed upon the party of the first part by the Postmaster-General, for failures and delinquencies in the performance of service under his contract, shall be assumed and borne by the party of the second part, and, if necessary, the Auditor of the Treasury for the Post Office Department may enforce this agreement by proper deductions from any compensation due the party of the second part for service performed under this subcontract.

And it is hereby further agreed that for any new, additional, or changed service required by the Postmaster-General in accordance with the terms of the advertisement and contract hereinbefore mentioned, the party of the second part shall not be allowed any increase of compensation; and in case of decrease or curtailment of the service by order of the Postmaster-General, no deduction therefor is to be made from the compensation of the party of the second part.

In case of total discontinuance of the service, as full indemnity therefor, a pro rata of the one month's extra pay allowed by the United States to the party of the first part is to be allowed to the party of the second part.

And it is hereby further agreed that in case of failure or refusal by the party of the second part to perform the mail service herein provided for, then the sum hereinbefore stipulated shall become immediately due to the party of the first part as liquidated damages, and not as a penalty, and, in default of payment thereof, may be recovered in an action of debt.

To the faithful performance of each and every covenant and agreement hereinbefore mentioned the parties do bind themselves, and each of them and their heirs and personal representatives, and in testimony thereof do hereunto set their hands and seals, the day and year set opposite their respective names.

Signed this 5th day of March, 1895.

W. WEIGHEL, [SEAL.]
Contractor with U. S.

By ———, [SEAL.]
His Attorney in Fact.

A. H. BOOMER,
Witness.

Signed this — day of —, 189—.

———,
Witness.

Signed this 6th day of February, 1895.

EZRA J. TRAVIS, [SEAL.]
Subcontractor.

GEO. G. TRAVIS,
Witness.

Signed this 1st day of March, 1895.

MATTHEW CULLEN, [SEAL.]
Surety.

W. E. TRAVIS,
Witness.

Signed this 1st day of March, 1895.

THOMAS McCOY, [SEAL.]
Surety.

W. E. TRAVIS,
Witness.

I, the undersigned, postmaster at Salt Lake City, State of Utah, do hereby certify that I am personally acquainted with the above subcontractor and his sureties, and believe them to be fully responsible and competent to execute the provisions of the foregoing contract, and that the subcontractor intends to comply with all of its terms and conditions.

Dated this 1st day of March, 1895.

A. H. NASH,
Postmaster.

65 *Certificate of the Oath of Mail Contractors and Carriers.*

Required by Act of Congress of June 8, 1872.

(Take This Oath After Signing the Foregoing Subcontract.)

I, Ezra J. Travis, being "employed in the care, custody, and conveyance of the mail" as subcontractor on Route No. 235,001, being Covered Regulation Wagon Service at Chicago, State of Illinois, do swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the

establishment of postoffices and post roads within the United States; and that I will honestly and truly account for and pay over any moneys belonging to the said United States which may come into my possession or control. And I do further solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign or domestic: So Help Me God.

EZRA J. TRAVIS,
Subcontractor.

COUNTY OF NEW YORK,
State of New York, ss:

Sworn before the subscriber, a Notary Public for the County and State aforesaid, this 21st day of February, A. D. 1895.

H. J. SCHREIBER, [SEAL.]
Notary Public,
No. 28, N. Y. Co.

Note.—This oath may be administered by a Postmaster or other officer qualified to administer oaths, but not by a Deputy or Assistant Postmaster.

If a firm or partnership becomes a subcontractor, each partner or member of the firm must take the oath prescribed by law; and each person employed in connection with the handling or custody of the mail must take the oath before entering on the service.

Principal Requirements of the Contract between the United States and the Party of the First Part to this Article of Contract, and Instructions to Bidders Contained in the Advertisement under which the Contract for Service on this Route was Awarded, to which this Article of Contract is subject.

(This contract is made on a blank form furnished by the Post Office Department. At the foot of this blank is printed in small type the principal requirements of the contract between the United States and the party of the first part to the original contract. All this appears in the original of the subcontract which has been filed with the original petition herein made by said Ezra J. Travis.)

The filing printed upon the form of subcontract, as so furnished by the Department, has a footnote reading as follows:

"This subcontract should be executed in triplicate, and one copy should be retained by the subcontractor. One copy must, under the permission given to sublet, be filed in the office of the Second Assistant Postmaster-General within thirty days after the date when service is to begin under it."

SERVEN & JOYCE,
Attorneys for Claimant.

67

EXHIBIT 2.

Know all men by these presents: that W. Weighel of the City and County of San Francisco, Contractor on mail messenger, transfer and mail station route number 235,001, City of Chicago, and the performance of which service was sublet by the said W. Weighel to E. J. Travis for the period from July 1st, 1895, to June 30th, 1899, does hereby authorize and empower the said E. J. Travis to bring suit against the United States Government for the recovery of any money or moneys due for any service performed that is not embraced in the contract made between the said Weighel and the said United States Government for the said service during the said period of time, any such suit or suits to be instituted at the sole cost, charge and expense of the said Travis and not otherwise.

As witness my hand and seal this 14th day of November, 1899.

(Signed)

W. WEIGHEL.

STATE OF CALIFORNIA,

City and County of San Francisco, ss:

On this 14th day of November, A. D. One Thousand Eight Hundred and Ninety-nine, before me, O. A. Eggers, a Notary Public in and for said City and County, residing therein, duly commissioned and sworn, personally appeared W. Weighel, known to me to be the person described in, whose name is subscribed to and who executed the annexed instrument and he acknowledged to me that he executed the same.

68.04 In witness whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

O. A. EGGERS,

*Notary Public in and for the City and
County of San Francisco, State of California.*

EXHIBIT 3.

Gordon & Young,
Attorneys and Counsellors-at-Law,
14 Sansome Street,
San Francisco, Cal.

Rooms 6, 7, 8, and 9.

Telephone 5098.

November 14, 1899.

E. J. Travis, Esq.,
525 East 15th Street, New York City.

DEAR SIR: Enclosed please find authority from Mr. Weighel to bring suit for the performance of station service in connection with route number 235,001 that was not a part of the contract. This authority is sent you upon the condition that you agree to hold and save harmless Mr. Weighel from all claims or demands of every kind or description that may be made by being made the plaintiff in the suit against the Government and upon the further condition as stated in the authority that any such suit or suits must be at your sole cost, charge and expense. Be good enough to acknowledge receipt of this letter and your acceptance of the conditions upon which the authority is sent. If any other authority is needed kindly advise me.

Yours very truly,
(Signed)

E. B. YOUNG.

(Exhibits "A," "B," "C," "D," "E," "F" are identical with the exhibits in the original petition and are omitted here.)

105 IV. *Demurrer to the Petition and Substituted Amended Petition Filed March 13, 1912.*

Now come the defendants by their Attorney General and demur to the petition — substituted amended petition filed in said cause, stating as the grounds thereof that the facts alleged in said petition are not sufficient to constitute a cause of action against the United States.

JOHN Q. THOMPSON,
Assistant Attorney General.

V. *Argument and Submission of Demurrer.*

On February 13, 1912, the demurrer of the defendants to the petition — substituted amended petition was argued and submitted by Mr. George M. Anderson for the defendants, and by Messrs. A. A. Hoehling, Jr., and A. R. Serven for the claimant.

106 VI. *Opinion on Demurrer, by Barney, J.*

Entered May 20, 1912.

Court of Claims of the United States.

No. 22532.

(Decided May 20, 1912.)

WILLIAM WEIGHEL

v.

THE UNITED STATES.

BARNEY, J., delivered the opinion of the court:

The questions for decision in this case arise upon the demurrer of the defendants to both the original and the amended petition filed herein. The reason for considering these demurrers separately will appear hereafter.

The original petition was filed by Weighel and its averments are substantially as follows: He entered into a contract with the Postmaster General for wagon service for carrying the mails in the city of Chicago from July 1, 1895, to June 30, 1899. Immediately before the execution of said contract there were in existence four street railway mail routes known and designated by numbers which are given, and which were then carrying the mails from the city post office, each to a different station in said city. It is further alleged that at the same time there were in existence some eight mail substations in said city, and that previous to November 14, 1895, the mail sent out from the city post office to these mail substations had been carried by the employees of the city post office; and likewise that the mail taken to and from the stations and railroad routes mentioned prior to said time had been carried by the city post-office employees. On the 14th of November, 1895, and at various dates thereafter he was compelled by the Government under his contract to carry the mails above mentioned as having been theretofore carried by the city post-office employees, and that said service was performed under protest.

It is further averred that by the terms of the advertisement for bids for the said contract for carrying mails the petitioner was instructed to make inquiries of the postmaster at Chicago for information relative to the service and its requirements; and that before entering into the contract he had made such inquiries and had been informed by said postmaster that said service so performed under protest would not be required. Also that he had made inquiries of the contractor who had had a like contract for the wagon service in the city of Chicago immediately before him regarding the requirements of said service and learned from him that he had been requested to perform the said service during the period of his contract

and had refused to comply on the ground that it was not within the terms of his contract, and upon such refusal he had not been
107 required to perform the same, but that the department had performed it with its own employees.

Copies of the contract, advertisement, and instructions to bidders above referred to are attached to and made a part of the Weighel petition, and, of course, must be consulted to determine the issue raised by the demurrer.

Without entering into detailed discussion of the different provisions of the contract, we think the case at bar comes within the principle laid down by the decision of this court in the case of Utah & California Stage Co. v. United States (39 C. Cls., 420), and that the petition states a cause of action.

We desire to call attention to one averment of the petition which though somewhat vague, seems to us to be very material in the decision of this demurrer, and that is the averment as to the construction given by the defendants to a contract for the same service entered into and completed immediately before the contract in the case at bar. It is alleged in the petition that the plaintiff "learned" of these facts from such prior contractor. If we take this statement as an averment that the facts were as thus "learned" (and we think the liberal rule as to the construction of pleadings upon demurrer requires us to do so) it seems to us that it brings this case within the decision of the Supreme Court in the case of Ceballos & Co. v. United States (214 U. S., 47) reversing this court (42 Ct. Cls 318). It was there held that where a contract requires construction, a "previous contract between the parties [relating to the same subject-matter] * * * and the construction which obtained in the execution thereof may serve within proper limitations to throw light upon the construction of the contracts here involved." It is true that in that case the contract thus construed was between the same parties, while in the case at bar one of the parties only is the same; but we see no difference in the principle involved. It is a question as to the construction of the somewhat doubtful terms of a contract with the Government, and the construction given by it to a contract in the same terms for the same service will certainly throw light upon the construction of the contract under consideration.

The Government's attorney calls our attention to the fact that it appears from a report of the Post Office Department that at the time of the execution of the contract with the plaintiff the work under it had been decreased from what it was immediately previous. This fact, however, does not appear from the pleadings and can not be considered upon demurrer.

For the reasons stated, the demurrer to the petition of William Weighel is overruled.

We will next consider the demurrer to the petition of Ezra J. Travis. Before the Weighel suit was ever brought to trial, and on August 6, 1907, the present claimant, Ezra J. Travis, filed a motion in the Weighel case asking leave to file an amended petition in that case, which motion was on the same day allowed "subject to objection by the Attorney General or anyone in interest." Travis, on the same

day, filed the petition under consideration, in which is set out substantially the same facts as contained in the Weighel petition in reference to the mail contract, extra services, etc., above mentioned.

In addition thereto he alleges that on February 6, 1895, he entered into a subcontract with Weighel by the terms of which he agreed, for \$70,000 per annum, to carry out the said mail contract which Weighel had entered into with the Government, and that he fully performed all of the mail service therein required, as well as all of the extra service for which the suit was brought by Weighel. He further alleges that Weighel declined to have suit brought in his own name for such extra services except upon the condition that the same should be brought at the sole expense of the claimant, Travis, and that after beginning this suit and before the filing of the amended petition Weighel had died. He prays judgment in his own name for the compensation for the extra services rendered under said contract, being the sum of \$52,327.

From the foregoing statement it will be seen that in substance the petitioner Travis seeks to be substituted for the petitioner Weighel, to recover upon the same cause of action set out in the original petition. As before stated, the defendants have demurred both to the original petition of Weighel and the amended petition of Travis.

The demurrer now under consideration is what is usually denominated a general demurrer in terms, but in addition to contending that the petition does not state facts sufficient to constitute a cause of action in favor of either Weighel or Travis, it is contended by the Government that whatever claim Travis may at one time have had under the averments of the amended petition it is now barred by the statute of limitations. As our view of that question settles it in favor of the Government, it is unnecessary to consider any other feature of the demurrer.

Whatever claim may have ever existed against the Government growing out of extra services performed under the mail contract set out in the petition belonged to either Weighel, the original contractor, or to Travis, the subcontractor; it could not have belonged to them jointly. If it belonged to Weighel it is unnecessary to say that that fact puts Travis out of court; if it belonged to Travis we do not see how, after the lapse of more than six years from the date it accrued, he can evade the statute of limitations by asking leave to be substituted as plaintiff in the case of Weighel, for, as before stated, that is the substance of what is asked for in the amended petition.

We are well aware of the tendency of modern legislation, as well as the practice of the courts, to favor the allowance of amendments to pleadings when necessary to effectuate substantial justice, and certainly there is no court in this country where amendments are more generously allowed than in this; but this can hardly be called an amendment and certainly is not an appeal to the court for leniency in allowing the correction of a mistake in pleading. The effect of the proposed amendment is to bring an entirely new suit in this court in the name and for the benefit of a new party plaintiff. We know of no authority for allowing an amendment for any such pur-

pose, with the ulterior object of avoiding the statute of limitations.

It is a misnomer to call it an amended petition, because, in effect, it is asking the court to allow the petitioner, Travis, to be substituted as party plaintiff for Weighel.

We can see no difference in principle nor in legal aspect in this case than if Weighel had brought a suit in a court of competent jurisdiction upon a promissory note and failed to bring it to trial within the period of the statute of limitations, and, while pending, and after the expiration of the period of the statute of limitations, Travis should come in and ask leave to amend the pleadings so as to make him party plaintiff, alleging that the promissory note was always his property.

The demurrer to the amended petition is sustained, and said petition is hereby dismissed.

Howry, J., was not present at the trial of this case and took no part in its decision.

110

VII. *History of Further Proceedings.*

On May 10, 1918, on motion made therefor and allowed by the Court, Charles F. Hunt, as Executor of William Weighel, was substituted as Claimant.

111

VIII. *Amended Petition and Exhibits.*

Filed June 11, 1918.

In the Court of Claims of the United States.

No. 22532.

CHARLES F. HUNT, Executor of the Estate of William Weighel,
Deceased, Substituted Claimant,

vs.

THE UNITED STATES.

Amended Petition.

Filed June 11, 1918.

To the Honorable the Court of Claims:

The above-named claimant, Charles F. Hunt, as executor of the estate of William Weighel, deceased, respectfully represents:

I.

That he is a citizen of the United States and the duly qualified and acting executor of the estate of William Weighel, deceased, the

original petitioner herein, that he is a resident of the city of
 112 San Francisco in the State of California, that he and the
 original petitioner hereinafter referred to as the petitioner,
 have at all times borne true allegiance to the Government of the
 United States, and have not in any way voluntarily aided or abetted
 or given encouragement to rebellion against the said Government,
 and that he believes the facts herein stated to be true.

II.

That on September 15, 1894, the Postmaster-General of the United States published an advertisement inviting proposals for covered regulation wagon mail messenger, transfer, and mail station service, at Cincinnati, Ohio; Cleveland, Ohio; Columbus, Ohio; Toledo, Ohio; Chicago, Illinois, and several other cities, from July 1, 1895, to June 30, 1899, in which advertisement the said service in Chicago was designated as Route No. 235,001. A copy of such portions of said advertisement as relate to the service in said city of Chicago is hereto attached, as a part hereof, and marked "Exhibit A."

III.

That your petitioner was the lowest bidder for said service on Route 235,001 in said city of Chicago, and entered into a contract for the performance of the same, with the Postmaster-General, from July 1, 1895, to June 30, 1899, said contract being in the form and upon the conditions as prescribed in said advertisement. See Exhibit "A" herewith.

IV.

Your petitioner further shows that at the time when said advertisement inviting bids for contracts for carrying the mails by regulation wagons on Route 235,001 in the said city of Chicago was issued, and at the time when the said contract with your petitioner was so made, and at the beginning of said contract terms, to wit, on the
 113 first day of July, 1895, and during the continuance of said contract term, there were in existence in said City of Chicago, by direction and order of the Postmaster-General, four certain street railway mail routes, known and designated respectively as route number 335,003, from the city post-office to Station "E," on which route the mails were carried by the West Chicago Street Railroad Company; route number 335,004, from the city post-office to Station "G," on which route the mails were carried by the West Chicago Street Railroad Company; route numbered 335,005, from the city post-office to Station "B," on which route the mails were carried by the North Chicago Street Railroad Company, and route numbered 335,006 (previously being numbered 135,136), from the city post-office to Station "N," on which route the mails were carried by the Chicago City Railway Company.

V.

Petitioner further shows that along and on said Route 335,003 there were sub-mail stations known and designated as Stations "C," "D," and "E," on Route 335,004, Stations "A" and "B," and on Route 335,006 (previously 135,136), Stations, "L," "M," and "N." That the mail sent out from the city post-office to be delivered at and into these various stations was carried previous to November 14, 1895, from said city post-office to the said city railways at the nearest practicable point on such railways, by the regular employees of the Post-Office Department, and were likewise delivered from the cars of said railways into said stations by such employees; and in like manner the mail to be delivered from one station to another and from the various stations to the city post-office, and other points, was carried from the respective stations to the cars, and from the cars to the city post-office, and from the cars to the station or stations and other points where the same was to be delivered, by the employees of the Post-Office Department.

114

VI.

By the terms of the advertisement aforesaid inviting bids for carrying the mail on Route No. 235,001, bidders were directed to inquire of the postmaster, at the city where the service was to be performed, for information relative to the service and its requirements. In pursuance of this instruction, your petitioner, before making the bid as aforesaid, did make inquiry of the then postmaster of said city of Chicago, and, among other inquiries, asked him if any of the service which was then being performed by the employees of the Post-Office Department in carrying the mail to and from the street railway cars aforesaid and the city post-office and the substations, all as above set forth, would thereafter and during the contract term from July 1, 1895, to June 30, 1899, be required of the party or person who should, during such term, be the contractor on said Route 235,001, and was assured by the said postmaster that no such service would be required of the said contractor.

And your petitioner further declares that before making his said bid he learned from the contractor on said Route 235,001 for the contract term from July 1, 1891, to June 30, 1895, that he had been requested by the officers of the Post-Office Department to take up and perform the said service of carrying the mail between the city post-office and the said street cars, and said cars and the said substations along the several street car routes as above described, but that he had refused to do so on the ground that it was not within the terms of his contract by which he engaged to perform the covered regulation wagon service on said Route 235,001, and upon such refusal he, the said contractor, had not been required to perform the said service and that the Department continued to perform it with its own employees. And pursuant to the assurance made your petitioner by the postmaster of the city of Chicago as herein stated, and the in-

formation gathered from the former contractor, as aforesaid, and the information set out in the said advertisement of September 15, 1894, your petitioner made the said bid to perform the service on said Route 235,001. .

VII.

That on or about the 14th day of November, 1895, the Postmaster-General made an order directing your petitioner to perform service as follows (or more frequently, if necessary), without additional pay, alleging the same to be in accordance with the terms of petitioner's contract, to wit: To make twelve trips each week day and three trips each Sunday from the general post-office in said city of Chicago to West Chicago Street Railway at Clark and Madison streets, and the same number of trips from said last-named point back to said general post-office; also twelve trips on each week day and three trips on Sundays from said general post-office to North Chicago Street Railway at Clark and Monroe streets, and the same number of trips from said last-named point back to said general post-office; also twelve trips on each week day and three trips on Sundays from said general post-office to West Chicago Street Railway at La Salle and Madison streets, and the same number of trips from last-named point back to said general post-office; also ten trips each week day and three trips on Sundays from Station "C" to the West Chicago Street Railway at Central avenue and Madison street, and the same number of trips from the last-named point back to Station "C;" also ten trips each week day and three trips each Sunday from Station "D" to West Chicago Street Railway at Western avenue and Madison street, and the same number of trips from the last-named point back to Station "D;" also ten trips on week days and three trips on Sundays from Station "E" to West Chicago Street Railway at Fortieth and Madison streets, and the same number of trips from the last-named point back to Station "E;" also ten trips each week day and three trips on Sundays from Station "F" to West Chicago Street Railway at Carpenter and Milwaukee avenues, and the same number of trips from the last-named point back to Station "F;" also
 116 ten trips each week day and three trips on Sundays from Station "G" to West Chicago Street Railway at Milwaukee and Western avenues, and the same number of trips from the last-named point back to Station "G;" also ten trips on each week day and three trips on Sundays from Station "A" to North Chicago Street Railway, North Clark and Oak streets, and the same number of trips from the last-named point back to Station "A;" also ten trips on each week day and three trips on Sundays from Station "B" to North Chicago Street Railway at Diversey street and Sheffield avenue, and the same number of trips from the last-named point back to Station "B;" all of which is duly set out in the copy of said order hereto attached and marked Exhibit "B" and made a part hereof.

VIII.

Your petitioner further states to the Court that on or about the 12th day of May, 1896, he received an order in general terms from J. A. Montgomery, the Superintendent of United States Mails at the city of Chicago, directing that on the 18th day of May, 1896, he, your petitioner, should take up the service of carrying the mails to and from the said city post-office and the cars on Cottage Grove avenue, and to and from Stations "L," "M," and "N," and said cars, the mails being at that time carried on said avenue by the Chicago City Street Railway, and the route being known and designated as route number 135,136 (subsequently numbered 335,006), which said order is hereto attached as Exhibit "C" and made a part hereof.

And that on or about the 27th day of May, 1896, he received through the said Superintendent of Mails a further order from the Postmaster-General signed by G. F. Stone, Acting Second Assistant Postmaster-General, directing your petitioner to make nine trips each week day and four trips on Sundays from Station "L" to the Chicago City Railway, and the same number of trips from the latter-named point back to Station "L;" also to make nine trips each week day

and four trips on Sundays from Station "M" to the Chicago City Railway, and the same number of trips from the last-named point back to Station "M;" also to make nine trips each week day and four trips Sundays from Station "N" to the Chicago City Railway, and the same number of trips from the last-named point back to Station "N;" all of which is duly set out in the copy of said order hereto attached and marked Exhibit "D" and made a part hereof.

IX.

Your petitioner further shows that on or about the 27th day of February, 1897, the Postmaster-General made an order, by the Acting Second Assistant Postmaster-General, directing your petitioner to carry the mail eleven trips on each week day and five trips on Sundays from Station "U" to the West Chicago Street Railway, and the same number of trips from the said last-named point back to Station "U;" also to make eleven trips each week day and five trips on Sundays from the West Chicago Street Railway, at the junction of Madison and State streets, to the Chicago City Railway, at the junction of Madison and Wabash avenues, and the same number of trips from the last-named point back to the West Chicago Street Railway, at the junction of Madison and State streets; all of which is duly set out in the copy of said order hereto attached and marked Exhibit "E" and made a part hereof.

X.

That when the aforesaid orders were made, to wit, on the 14th day of November, 1895, the 12th day of May, 1896, the 27th day

of May, 1896, and the 27th day of February, 1897, to carry the mails between the city postoffice and points on the several street railways, and between the mail stations "A," "B," "C," "D," "E," "F," "G," "L," "M," "N," and "U," and the said railways, the said mails were being carried over said railways under contracts by the several railway companies with the Postmaster-General, as follows: The mails supplying stations "C," "D," and "E," on and over the West Chicago Street Railway, and over route number 335,003; the mails supplying stations "F," "G," and "U," on and over a line of the same railway, the route being numbered 335,004; the mails supplying stations "A," and "B," on and over the North Chicago Street Railway, the route being numbered 335,005; and the mails supplying stations "L," "M," and "N," on and over the Chicago Street Railway, the route being numbered 335,006.

XI.

That upon receiving the said several orders stated in the last paragraph, your petitioner protested against the performance of said service as not being within the terms and conditions of his aforesaid contract to perform the Covered Regulation-Wagon Mail-Messenger, Transfer, and Mail Station Service on route No. 235,001 for the said term from July 1, 1895, to June 30, 1899, and advised the United States, through its proper department, that for the performance of such service he would claim and demand reasonable compensation.

XII.

That in pursuance of said several orders, and under the terms of the said several protests, your petitioner performed all of said additional service and made all the additional trips hereinbefore set forth, although such services were not within the terms of his contract aforesaid, and they were fairly and reasonably worth, over and above all just credits and offsets, the sums hereinafter set forth in your petitioner's Bill of Particulars, hereto attached as Exhibit "F" and made a part hereof; and your petitioner avers that said claim has not been assigned or transferred by him, and that all of said service was received and accepted by the United States, and by reason thereof there arises on the part of the United States an implied promise to pay your petitioner the reasonable worth of the same.

119

XIII.

And your petitioner therefore prays judgment against the United States for the sum of \$52,327.60.

CHARLES F. HUNT,

Executor.

By A. R. SERVEN,

Attorney for Petitioner.

SERVEN & JOYCE,

1422 F St. N. W., Washington, D. C.,

Attorneys for Petitioner.

DISTRICT OF COLUMBIA,
City of Washington, ss:

Before me, the undersigned, a notary public, in and for the said District and city, personally appeared A. R. Serven, the attorney for the claimant therein, who, being duly authorized to verify the petition, and who being duly sworn, deposes and says that he has read the foregoing petition by him subscribed, and is acquainted with the contents thereof; that the matters and things therein contained and stated are true, as he verily believes; that the claimant is justly entitled, as shown in said petition, to the moneys therein claimed to be due and owing to him from the United States, after allowing all just credits and set-offs, and that to the best of deponent's knowledge and belief no assignment or transfer of the claim therein set forth, or any part thereof, or any interest therein, has been made by the claimant to any one whomsoever or by any one in his behalf.

A. R. SERVEN.

Subscribed and sworn to before me this 20th day of May, A. D. 1918.

W. B. JAYNES, *Notary Public.*

(Here follows table marked page 126.)

120-129

EXHIBIT A.

Proposals for Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service.

Post Office Department,
 Washington, D. C., September 15, 1894.

Proposals will be received at the contract office of this Department until 4 P. M. of December 4, 1894, for carrying the mails of the United States in the covered regulation wagons prescribed by the Department, on the routes herein specified, being covered regulation wagon mail messenger, transfer, and mail station service in the cities hereinafter named, between the post-offices and railroad stations, between the post-offices and steamboat landings, between the post-offices and mail stations, and between the several railroad stations, steamboat landings and mail stations, as prescribed herein, for the term from July 1, 1895, to June 30, 1899, viz:

Cincinnati, Ohio,
 Cleveland, Ohio,
 Columbus, Ohio,
 Toledo, Ohio,
 Chicago, Ill.,

Detroit, Mich.,
 Milwaukee, Wis.,
 Minneapolis, Minn.,
 St. Paul, Minn.,
 Kansas City, Mo.,

St. Louis, Mo.

Decisions announced on or before December 21, 1894.

Contracts to be returned to the Departments, duly executed, within thirty days from date of acceptance of proposals.

Route No. 235,001—Continued.

Mail Station Service—Continued.

From—	To—	Distance.	Number of trips daily, except Sunday.	Number of trips on Sunday.	Total number of trips a week.	Running time allowed from July 1, 1896.
		<i>Miles.</i>				<i>Min.</i>
General post-office, by Stations L and M.	Station N.	6.71	4	2	26	72
Station N, by Stations M and L.	General post-office ...	6.71	4	2	26	72
Station O	Lake Shore & Michigan Southern R.R.	0.50	6	2	39	12
Lake Shore & Michigan Southern R.R.	Station O	0.50	10	5	65	12
Station O	Chicago, Rock Island & Pacific R.R.	0.50	5	2	32	12
Chicago, Rock Island & Pacific R.R.	Station O	0.50	5	2	32	12
Station O	Pittsburg, Ft. Wayne & Chicago R.R.	0.34	12	4	76	10
Pittsburg, Ft. Wayne and Chicago R.R.	Station O.	0.34	7	3	45	10
Station S.	Lake Shore & Michigan Southern R.R.	0.57	5	2	32	15
Lake Shore & Michigan Southern R.R.	Station S.	0.57	8	4	52	15
Station S.	Pittsburg, Ft. Wayne & Chicago R.R.	0.50	8	1	49	12
Pittsburg, Ft. Wayne & Chicago R.R.	Station S.	0.50	6	2	38	12
Station S.	Baltimore and Ohio R.R.	0.53	3	2	20	15
Baltimore & Ohio R.R.	Station S.	0.53	3	2	20	15
Forest Hill Substation	Pittsburg, Cincinnati, Chicago & St. Louis R.R.	0.22	5	1	31	10
Pittsburg, Cincinnati, Chicago & St. Louis R.R.	Forest Hill Substation	0.22	5	1	31	10
General post-office ...	Substation 2	5.03	1	.....	6	105
Substation 2, by Substations 5, 1, and 3.	General post-office ...	5.33	2	.....	12	75
General post-office by Substation 2.	Substation 5	6.57	1	.....	6	120



(Schedules for mail messenger service, transfer service, and for mail station service, excepting the page included, and, probable and additional service are omitted here.)

130

Instruction to Bidders.

1. The foregoing schedules show the service, August 15, 1894, as near as can be stated. Bidders must inform themselves of the amount and character of the service that will be required during the next contract term.

The statements of probable additional service that may be necessary on the routes under this advertisement are given so that bidders may be as fully advised as possible of the amount service likely to be required. It will not, however, limit the liability of the contractors to perform all service that may become necessary, without
131 additional pay.

2. The contractors under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1895, or at any time thereafter during the contract term, whether between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations, now established or that may hereafter be established, whether caused by the establishment of new or by change of site of existing post-offices, railroad stations, steamboat landings, or mail stations within said cities, or caused by the alteration of the routes made necessary for any other reason. Bids must be made with this distinct understanding and must name the amount per annum for the whole service and not by the trip.

3. There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster-General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing a full indemnity to the contractor, one month's extra pay.

4. The Postmaster-General may annul a contract for repeated failures; for violating the Postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a driver or any person having charge of the mail when required by the Department; for transmitting commercial intelligence of matters which should go by mail contrary to the stipulations herein, or for transporting persons so engaged; whenever the contractor shall become a postmaster, assistant postmaster, clerk in a post-office, or member of Congress, and whenever, in the opinion of the Postmaster-General, the service cannot be safely continued or the laws
132 maintained on the route.

Fines will be imposed for neglect of duty.

5. The Postmaster-General may, in his discretion, continue in force, beyond its express terms for a period not exceeding six months, any contract made under this advertisement until a new contract with the same or other contractors shall be made.

6. The distances given are believed to be substantially correct, but no additional pay will be allowed should they be greater than herein stated. Bidders must inform themselves as to the distances, the running time, the weight of the mails, the condition of hills, streets, toll bridges, ferries, and obstructions of all kinds whereby expense may be incurred, and as to the probable increase, additional service, or changes likely to be rendered necessary. Claims for additional pay based upon such grounds, or for alleged mistakes or misapprehensions as to the service required, or for bridges destroyed, or ferries discontinued, can not be considered.

7. Foreign mails in transit across the territory of the United States shall, within the meaning of this advertisement, be deemed and taken to be mails of the United States.

8. The transfer service shall include the conveyance of all post-office supplies arriving for the city post-office or for transit through the city.

9. Contractors will be required to convey on the driver's seat of each wagon, whenever necessary, one railway post-office clerk, a substitute, or a messenger.

10. Drivers must be over sixteen years of age, of good moral character, and able to read and write the English language.

133 They must take the oath required by law, and must wear the prescribed cap or hat.

11. All service must be performed in regulation wagons constructed in accordance with the plans and specifications adopted by the Department September 1, 1894. There are four sizes of regulation wagons, viz., the large two-horse wagon, the medium two-horse wagon, the large one-horse wagon, and the small one-horse (or pony) wagon. All of these wagons are to be built with closed bodies. In a few exceptional cases where, in the judgment of the Department, regulation wagons are not necessary, permission may be given to perform a limited portion of the service either in one-horse two-wheel carts or in push carts, built according to plans and specifications furnished by the Department; but these carts must not be used in the performance of service unless specially authorized by the Second Assistant Postmaster-General. Full particulars as to style and construction of wagons required may be obtained on application to the Second Assistant Postmaster-General, Washington, D. C. The wagons must be kept painted and varnished in a thorough manner and ornamented according to specifications. They must be frequently washed and kept clean and in good condition. Only first-class wagons of the prescribed pattern will be accepted. No lettering will be permitted on any part of the wagons other than such as is

required by the specifications. The horses used must be suitable for the work, presenting a creditable appearance, and be in first-class condition at all times.

12. When mails are delayed in arrival, wagons must be kept at the depots or landings until the arrival of such mails, and the same be conveyed to the post-office without detention. Except in cases of accident, wagons containing mail must not be opened, or the mails therein contained while in transit. The mails must be
134 carried inside of the wagons and not on the outside or on the seat with the driver, and in no case shall any person be allowed to ride inside of the wagon containing mail.

13. The equipment of the contractor shall be subject to frequent inspections, and the refusal or failure of any contractor to keep his wagons, horses, and harness in good order and appearance, or to furnish proper drivers, so as to perform the service in a style creditable to the Department, shall be sufficient cause for the annulment of his contract and the reletting of the service at his expense.

14. Specifications for cap and hat: Cap—To be of all-wool blue flannel of good quality, three and one-fourth inches high; solid leather fronts one and three-fourths inches deep, with one small regulation P. O. D. button on each side, a silver wreath in front inclosing the words "U. S. Mail," and to have one oiled linen cover. Hat—
from June 16 to September 15 of each fiscal year, in lieu of the cap, a straw hat with rim not to exceed three and one-half inches in width and a crown not to exceed four inches in height may be worn. A silver wreath inclosing the words "U. S. Mail" shall be placed on the front of the hat. In severe winter weather the drivers for the contractor will be permitted to wear warm woolen caps of a uniform appearance with regulation badge on front.

15. The wagons, horses, harness, and drivers are to be at all times subject to the approval and control of the postmaster, and the mails are to be taken from and delivered into the post-offices, mail stations, steamboats, and cars at such points and at such hours, under his direction, approved by the Postmaster-General, as will secure proper dispatches and connections, and at the contractor's expense for tolls and ferriage.

16. The number of wagons required must be sufficient, in the opinion of the postmaster, for the prompt and proper per-
135 formance of the service. The postmaster will also determine which of the sizes of the several regulation wagons mentioned herein will be necessary.

17. The contractor will be required to provide and keep on hand a sufficient number of extra wagons to take the place of those which may be temporarily disabled, delayed, waiting for trains, or withdrawn from service for repairs, or required by the increase of service, so that the service shall always be promptly performed in regulation wagons.

18. Every proposal must be accompanied by a bond, with two or more sureties, approved by the postmaster, and in cases where the amount of the bond exceeds five thousand dollars (\$5,000) the approval must be by a postmaster of the first, second, or third class.

19. Sureties on the bond of a bidder must take an oath before an officer qualified to administer oaths that they are the owners of real estate worth, in the aggregate, a sum double the amount of said bond, over and above all debts due and owing by them, and all judgments, mortgages, and executions against them, after allowing all exemptions of every character whatever. A married woman will not be accepted as a surety, either on the bond of a bidder or upon a contract. Accompanying the bond of a bidder, and as a part thereof, shall be a statement of the sureties under oath, showing the amount of real estate owned by them, brief descriptions thereof, and its probable value, where it is situated, and in what county and State the record evidence of their title exists. Any surety who swears falsely to this statement is deemed by the law guilty of perjury, and is punishable as is prescribed by law for that crime.

20. There should be but one route bid for in a proposal. Consolidated or combination bids ("proposing one sum for two or more routes") cannot be considered.

21. Bidders are cautioned to forward their proposals in
136 time to reach the Department, or to file them, by the day and hour named in this advertisement, as bids received after that time will not be considered. If sent by mail or express, ample time should be allowed for their transit, as they cannot be deemed to be received at the Department until actually delivered at the contract office; neither can bids be considered which are without bond, oath, or certificate required by section 245, act of June 23, 1874, and section 246, act of August 11, 1876. No withdrawal of a bid will be allowed unless the withdrawal is received twenty-four hours previous to 4 P. M., December 4, 1894.

22. No contract for carrying the mail shall be made with any person who has entered, or proposed to enter, into any combination to prevent the making of any bid for carrying the mail, or who has made any agreement, or given or performed, or promised to give or perform, any consideration whatever to induce any other person not to bid for any such contract.

23. In case of failure of the accepted bidder to execute a contract within the prescribed time, or of the abandonment of service during the contract term, the service will be relet at the expense of the failing bidder or contractor, and any accepted bidder who shall wrongfully refuse or fail to enter into contract in due form, and to perform the service prescribed in his proposal, may be deemed guilty of a misdemeanor, and on conviction thereof be fined and imprisoned therefor.

24. The Postmaster-General reserves the right to suspend the award of contract on any route for a period of not exceeding thirty days after the date fixed in this advertisement, with a corresponding allowance of time for the execution of contract, and to reject all bids on any route whenever in his judgment the interests of the service require it; and also to disregard bids of failing contractors 137-145. and bidders, and also to disregard bids accompanied by bonds on which there appears as surety the name of a person who has been declared a failing contractor or bidder, or been barred from bidding for any reason whatever.

25. Postmasters are cautioned, under penalty of removal, not to approve the bond of any bidder before the proposal is completed and the bond is signed by the bidder and his sureties, and not until entirely satisfied of the sufficiency of the sureties. They are also cautioned not to divulge to any one the amount of any proposal certified to them. Doing so will be sufficient cause for their removal.

26. No postmaster, assistant postmaster, or clerk employed in any post-office shall be a contractor, or concerned in a contract for carrying the mail.

27. Bidders are requested to use the blanks for proposals furnished by the Department, which may be obtained at the post-office on each route herein advertised. For information relative to the service and its requirements, bidders are requested to apply to the postmaster at the city where the service is to be performed.

28. Proposals should be inclosed in envelopes, sealed, and superscribed "Proposals for covered regulation-wagon mail-messenger, transfer, and mail-station service, City of —," and addressed to the Second Assistant Postmaster-General, Post-Office Department, Washington, D. C.

The accepted bidder will be required to execute a contract in the following form:

Form of contract omitted, being the same as the executed contract, copy of which was filed with the amendment to the amended petition.

146

EXHIBIT B.

Washington, D. C., November 14, 1895.

SIR: You are informed that the following order has this day been made in regulation wagon route No. 235,001, Chicago, Illinois:

"Require contractor to perform service as follows (or more frequently, if necessary) without additional pay, in accordance with the terms of his contract."

Additional Mail Station Service.

From—	To—	Distance. Miles.	No. of trips daily, except Sunday.	No. of trips on Sunday.	Total number of trips a week.	Running time. Min.
General post-office.....	W. Chicago St. Rwy., Clark and Madison streets .....	.26	12	3	75	7
West Chicago St. Rwy., Clark and Madison street.	General post-office....	.26	12	3	75	7
General post-office.....	N. Chicago St. Rwy., Clark and Monroe streets .....	.18	12	3	75	6
N. Chicago St. Rwy., Clark and Monroe streets.	General post-office....	.18	12	3	75	6
General post-office.....	W. Chicago St. Rwy., La Salle and Madi- son streets.....	.34	12	3	75	8
W. Chicago St. Rwy., La Salle and Madison streets.	General post-office....	.34	12	3	75	8
Station C.....	W. Chicago St. Rwy., Central avenue and Madison street.....	.11	10	3	63	5
W. Chicago St. Rwy., Cen- tral avenue and Madison street.	Station C.....	.11	10	3	63	5
Station D.....	W. Chicago St. Rwy., Western avenue and Madison street.....	.15	10	3	63	6
W. Chicago St. Rwy., West- ern avenue and Madison street.	Station D.....	.15	10	3	63	6
Station E.....	W. Chicago St. Rwy., 40th and Madison streets .....	.09	10	3	63	5
W. Chicago St. Rwy., 40th and Madison streets.	Station E.....	.09	10	3	63	5
Station F.....	W. Chicago St. Rwy., Carpenter and Mil- waukee avenue.....	.04	10	3	63	5
W. Chicago St. Rwy., Car- penter and Milwaukee ave- nue.	Station F.....	.04	10	3	63	5
Station G.....	W. Chicago St. Rwy., Milwaukee and Western avenue....	.14	10	3	63	6
W. Chicago St. Rwy., Mil- waukee and Western ave- nue.	Station G.....	.14	10	3	63	6
Station A.....	N. Chicago St. Rwy., N. Clark and Oak streets .....	.11	10	3	63	6
N. Chicago St. Rwy., N. Clark and Oak streets.	Station A.....	.11	10	3	63	6

147

Additional Mail Station Service—Continued.

From—	To—	Distance.	No. of trips daily, except Sunday.	No. of trips on Sunday.	Total number of trips a week.	Running time.
		<i>Miles.</i>				<i>Min.</i>
Station B.....	N. Chicago St. Rwy., Diversey street and Sheffield avenue....	.23	10	3	63	10
N. Chicago St. Rwy., Diver- sey street and Sheffield ave- nue.	Station B.....	.23	10	3	63	10

Permit the contractor to use regulation carts in the performance of this service whenever in the judgment of the postmaster at Chicago, Illinois, such carts can be used advantageously in the service.

Very respectfully,

G. F. STONE,

Acting Second Assistant P. M. General.

Mr. W. Weighel,

Care S. C. Ramage,

No. 409 B street N. E., Washington, D. C.

148

EXHIBIT C.

May 12, 1896.

Mr. E. J. Travis,

U. S. Mail Messenger,

Chicago, Ill.

SIR: I beg to advise you that beginning Monday, the 18th, service between this office and Stations L, M, and N will be performed by Chicago and Cottage Grove ave. R. P. O. as per schedule herewith.

Kindly make the necessary arrangement to have this service begin at the central office and by transfers from Stations L, M, and N, beginning Monday morning.

Respectfully,

J. A. MONTGOMERY,

Supt. of Mails.

149

EXHIBIT D.

Washington, D. C., May 27, 1896.

SIR: You are informed that the following order has this day been made on regulation wagon route No. 235,001, Chicago, Illinois:

"Require contractor to perform service as follows (or more frequently, if necessary) without additional pay, in accordance with the terms of his contract."

Additional Mail Station Service.

From—	To—	Distance.	No. of trips daily, except Sunday.				No. of trips on Sunday.				Total number of trips a week. Running time.			
		Miles.												
Station L.....	Chicago City Rwy.... (135136)	0.08	9	4	38	5								
Chicago City Rwy..... (135136)	Station L.....	0.08	9	4	38	5								
Station M.....	Chicago City Rwy.... (135136)	0.03	9	4	38	5								
Chicago City Rwy..... (135136)	Station M.....	0.03	9	4	38	5								
Station N.....	Chicago City Rwy.... (135136)	0.02	9	4	38	5								
Chicago City Rwy..... (135136)	Station N.....	0.02	9	4	38	5								

Very respectfully,

G. F. STONE,
Acting Second Assistant P. M. General.

Mr. Weighel,
Care of E. J. Travis,
No. 90 W. Congress St.,
Chicago, Illinois.

150-155

EXHIBIT E.

Washington, D. C., February 27, 1897.

SIR: You are informed that the following order has this day been made:

"From March 3, 1897, require the contractor to perform services as follows (or more frequently, if necessary) without additional pay, in accordance with the terms of the contract."

Additional Mail Station Service.

From—	To—	Distance.	No. of trips daily, except Sunday.	No. of trips on Sunday.	Total number of trips a week.	Running time allowed.
		<i>Miles.</i>				<i>Min.</i>
General post-office.....	Station U.....	1.16	10	5	65	30
Station U.....	General post-office....	1.16	10	5	65	30
Station U.....	West Chicago St. Ry., Madison and Jefferson streets.....	.38	11	5	71	15
West Chicago St. Ry., Madison and Jefferson streets.	Station U.....	.38	11	5	71	15

Additional Transfer Service.

From—	To—	Distance.	No. of trips daily, except Sunday.	No. of trips on Sunday.	Total number of trips a week.	Running time allowed.
		<i>Miles.</i>				<i>Min.</i>
West Chicago St. Ry. (Junc- tion Madison and State streets).	Chicago City Ry. (Junction Madison and Wabash ave- nues)	0.08	1	5	71	
Chicago City Ry. (Junction Madison and Wabash ave- nues).	West Chicago St. Ry. (Junction Madison and State streets)..	0.08	1	5	71	

Very respectfully,

G. F. STONE,

Acting Second Assistant P. M. General.

Mr. W. Weighel,

Care of E. J. Travis,

No. 90 W. Congress St., Chicago, Ill.

(Sufficiently covered by Finding IV.)

156 IX. *Amendment to the Amended Petition Filed by Leave of Court April 12, 1919.*

In the Court of Claims of the United States.

No. 22532.

CHARLES F. HUNT, Executor of the Estate of William Weighel,
Deceased, Substituted Claimant,

VS.

THE UNITED STATES.

Amendment to the Amended Petition Filed June 11, 1918.

(Filed April 12, 1919.)

To the Honorable the Court of Claims:

The court having ordered that claimant's amended petition filed June 11, 1918, have annexed thereto a copy of the executed contract involved in this cause, and as explained to the court at the time said order was made, the claimant not being in possession of the said contract, and counsel for the defendants thereupon offering to furnish a certified copy thereof from the files of the Post-Office Department, but having now informed counsel for claimant that such copy cannot be so furnished, and the court having ordered on April 7, 1919, that claimant add to his said amended petition an extract from the report of the Post-Office Department contained in the record in relation to said executed contract, in compliance therewith claimant hereby adds said extract from pages 108 to 117, inclusive, of the record, as exhibit G hereby attached to his said amended petition, beginning at page 47a thereof.

CHARLES F. HUNT,

Executor,

By A. R. SERVEN,

Attorney for Petitioner.

SERVEN & JOYCE,

1422 F St. N. W., Washington, D. C.,

Attorneys for Petitioner.

DISTRICT OF COLUMBIA,

City of Washington, ss:

Before me, the undersigned, a notary public, in and for the said District and city, personally appeared A. R. Serven, the attorney for the claimant therein who, being duly authorized to verify the petition, and who being duly sworn, deposes and says that he has read the foregoing statement and schedule G attached, and that said

statement is true and that said schedule G contains a true and correct copy of that part of the printed report of the Post-Office Department from pages 108 to 117, inclusive, of the record herein.

A. R. SERVEN.

Subscribed and sworn to before me this 12 day of April, A. D. 1919.

[SEAL.]

W. B. JAYNES,
Notary Public.

158

EXHIBIT G.

(The following extract from the report of the Postmaster General, will be found at pages 108 to 117, inclusive, of the printed record herein.)

Proposal.

The undersigned, W. Weighel, whose post-office address is San Francisco, county of San Francisco, State of California, proposes to carry the mails of the United States, subject to all the requirements contained in the advertisement of the Postmaster-General, dated September 15, 1894 (being the advertisement inviting proposals for the covered regulation wagon mail messenger, transfer, and mail station service), from July 1, 1895, to June 30, 1899, on route No. 235001, between the post-office at Chicago, Ill., and the railroad stations, between said post-office and the steamboat landings, between said post-office and the mail stations, and also between the several railroad stations, steamboat landings, and mail stations, in the covered regulation wagons prescribed by the Department, for the sum of seventy-two thousand four hundred dollars per annum; and if this proposal is accepted he will enter into contract, with sureties to be approved by the Postmaster-General, within thirty days from the date of acceptance.

This proposal is made after due inquiry into, and with full knowledge of, all particulars in reference to the service; and, also, after careful examination of the conditions attached to the advertisement, and with the intent to be governed thereby.

Dated November 26, 1894.

W. WEIGHEL,
Bidder.

159 *Oath Required by Section 245 of an Act of Congress Approved June 23, 1874, to be Affixed to Each Bid for Carrying the Mail, and to be Taken Before an Officer Qualified to Administer Oaths.*

I, W. Weighel, of San Francisco, California, bidder for carrying the mail on the covered regulation wagon mail messenger, transfer and mail station route No. 235001, between the post-office at Chicago, Ill., and the railroad stations between said post-office and the steamboat landings, between said post-office and the mail stations, and also

between the several railroad stations, steamboat landings, and mail stations, as above, do swear that I have the ability, pecuniarily, to fulfill my obligation as such bidder; that the bid is made in good faith and with the intention to enter into contract and perform the service in case said bid shall be accepted.

W. WEIGHEL,
Bidder.

Sworn to and subscribed before me, a notary public for the city and county of San Francisco, California, this 26th day of November, A. D. 1894, and in testimony thereof I hereunto subscribe my name and affix my official seal the day and year aforesaid.

GEO. T. KNOX, [SEAL.]
Notary Public.

NOTE.—When the oath is taken before a justice of the peace, or any other officer not using a seal, except a judge of a United States court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer.

The proposal must be signed by the bidder or each of the bidders, and the date of signing affixed.

Direct to the "Second Assistant Postmaster-General, Post-Office Department, Washington, D. C.," marked "Proposal for covered regulation wagon mail messenger, transfer, and mail station service, city of —."

160

*Bond.**Directions.*

Insert the names of the principal and sureties in full in the body of the bond; also the date. The signatures to the bond should be witnessed, and the certificate on the inside, if signed by a justice of the peace, should be accompanied by a certificate of a clerk of a court of record showing authority of the justice of the peace to act as such, or, if signed by a notary public, he should affix his seal.

Know all men by these presents that W. Weighel, of San Francisco, in the State of California, principal, R. McMurray and A. H. Boomer and H. Wadsworth, of San Francisco, in the State of California, as sureties, are held and firmly bound unto the United States of America in the just and full sum of one hundred thousand dollars, lawful money of the United States, to be paid to the said United States of America or its duly appointed or authorized officer or officers; to the payment of which, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 26th day of November, 1894.

Whereas by an act of Congress approved June 23, 1874, entitled "An act making appropriations for the service of the Post-Office

Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-five, and for other purposes," it is provided "that every proposal for carrying the mail shall be accompanied by the bond of the bidder, with sureties approved by a postmaster," in pursuance whereof, and in compliance with the provisions of said law, this bond is made and executed, subject to all the terms, conditions, and remedies thereon, in the said act provided and prescribed, to accompany the foregoing and annexed proposal of the said W. Weighel, bidder.

Now, the condition of the said obligation is such that if the said W. Weighel, bidder, as aforesaid, shall, within such time after his bid is accepted as the Postmaster-General has prescribed in said advertisement of route No. 235001, to wit, within thirty days from the date of acceptance enter into and file in the Department a
161 contract with the United States of America, with good and sufficient sureties, to be approved by the Postmaster-General, to perform the service proposed in his said bid, and further shall perform said service according to his contract, then this obligation shall be void; otherwise, to be in full force and obligation in law.

In witness whereof we have hereunto set our hands and seals this 26 day of Nov., 1894.

[Bidder sign here.] W. WEIGHEL. [SEAL.]

[Sureties sign here.] { R. McMURRAY. [SEAL.]
H. WADSWORTH. [SEAL.]
A. H. BOOMER. [SEAL.]

Witnesses:

E. B. YOUNG.

R. H. McKENNA.

NOTE.—Any alteration, by erasure or interlineation, of a material part of the foregoing bond will cause it to be rejected, unless it appears by a note or memorandum, attested by the witnesses, that the alteration was made before the bond was signed and sealed.

When partners are parties to the bond, the partnership name should not be used, but each partner should sign his individual name.

A married woman will not be accepted as surety. Sureties are liable during the whole of contract term.

Interrogatories.

The following interrogatories are prescribed by the Postmaster-General, to be answered, under oath, by each of the sureties in the foregoing bond, and no bid will be considered in which these interrogatories are not fully and satisfactorily answered:

1. What amount in value of real estate is owned by you?
2. Of what description—town or city lots, improved or unimproved, or farming land, cultivated or uncultivated?
3. Where is it situated—county and State?

4. In what county and State does record evidence of your title exist? (Answer fully on next page.)

Especial attention is called to the interrogatories to be answered fully below. The value, description, location, and place of
162 record of real estate of each surety must be stated as required by the interrogatories; "ditto," "do," or ditto marks should not be used.

Oath of Sureties.

STATE OF CALIFORNIA,

County of San Francisco, ss:

On this 26th day of November, 1894, personally appeared before me R. McMurray, A. H. Boomer, and H. Wadsworth, sureties in the foregoing bond, to me known to be the persons named in said bond as sureties, and who have executed the same as such, who, being by me duly sworn, depose and say, and each for himself deposes and says, he has executed the within bond; that his place of residence is correctly stated therein; that he is the owner of real estate worth the sum hereinafter set against his name over and above all debts due and owing by him, and all judgments, mortgages, and executions against him after allowing all exemptions of every character whatever, the total sum thus assured amounting to (\$200,000) two hundred thousand dollars, being double the amount of the foregoing bond.

And in answer to the foregoing interrogatories, each of the said sureties further deposes and says that the value, description, and location, and place of record evidence of title of his real estate is as follows:

Names of sureties.	Value of real estate. (Answer to interrogatory No. 1.)	Description of real estate. (Answer to interrogatory No. 2.)	County and State where located. (Answer to interrogatory No. 3.)	County and State where record evidence of title is. (Answer to interrogatory No. 4.)
R. McMurray.....	\$100,000	Improved city lots.....	San Francisco, California.	San Francisco, California.
H. Wadsworth.....	50,000	Unimproved and improved land consisting of city lots.	San Francisco and Alameda, Cal.	San Francisco and Oakland, Alameda Co., California.
A. H. Boomer.....	\$50,000	Unimproved and improved real estate consisting of city lots.	San Francisco, Cal., and Ada Co., Idaho.	San Francisco, Cal., and Boise City, in Ada Co., Idaho.

R. McMurray.
 H. Wadsworth.
 A. H. Boomer.

Sureties
 Sign here.

Subscribed and sworn to before me this 26th day of November 1894.

[SEAL.]

GEO. T. KNOX,
Notary Public.

163 NOTE.—When the above oath is taken before a justice of the peace, or any other officer not using a seal, except a judge of a United States court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer. If the oath is taken before a notary public and his seal is affixed, the certificate of the clerk of a court is not necessary.

Certificate of Postmaster.

I, the undersigned, postmaster at San Francisco, State of California, after the exercise of due diligence to inform myself of the pecuniary ability and responsibility of the principal and his sureties in the foregoing bond, and of the real estate owned by them respectively, do hereby approve said bond, and certify that, in my belief the said sureties are sufficient—sufficient to insure the payment of double the entire amount of the said bond; and I do further certify that the said bond was duly signed by W. Weighel, bidder, and R. McMurray, A. H. Boomer, and H. Wadsworth, his sureties before signing this certificate.

FRANK McCOPPIN,
Postmaster.

Dated November 26, 1894.

Postmasters will observe that the improper approval of the bond or the certificate of the sufficiency of sureties therein, exposes them not only to dismissal but also to fine or imprisonment.—Sec. 735 Postal Laws and Regulations, 1893. The approval of the sureties must be by a postmaster, and not by an assistant postmaster, or other substitute, either in his own name or in the name of the postmaster.

(Indorsed:) Covered regulation wagon mail-messenger, transfer and mail station service. Route No. 235001. City of Chicago, Ill. (Advertisement of September 15, 1894.) (July 1, 1895, to June 30, 1899.) Proposal of W. Weighel. \$72,400. Indorsed and examined by W. A. D., Dec. 7, 1894. Recorded by W. A. D., Dec. 7, 1894. [Bidders will write nothing whatever on this face.]

164

Post-Office Department,

Office of the Second Assistant Postmaster-General.

Washington, D. C., December 21, 1894.

Ordered (No. 29613):

That the proposals from the following-named persons and partnerships for the covered regulation wagon mail-messenger, transfer

ber and mail-station service, under the advertisement of September 15, 1894, for the period from July 1, 1895, to June 30, 1899, on the routes and at the compensations hereinafter set forth, be accepted; and that contracts be made with the several persons and partnerships, respectively, for the service to be performed on the several routes during the term before mentioned, and at the compensations respectively named; the contracts to be approved by the Postmaster-General and delivered at the office of the Second Assistant Postmaster-General on or before January 20, 1895:

Route.	City and State.	Accepted bidder.	Annual pay.
235001	Chicago, Illinois.....	W. Weighel.....	\$72,400

W. S. BISSELL,
Postmaster-General.

(Form No. 2605.)

Contract for Mail Service.

Covered Regulation Wagon Mail Messenger, Transfer, and Mail Station Service in the City of Chicago, Ill.

Route No. 235001.

Annual rate of pay, \$72,400.00.

Contractor's address: San Francisco, San Francisco Co., State of Cal.

This article of contract, made the 21 day of December, eighteen hundred and ninety-four, between the United States of America (acting in this behalf by the Postmaster-General) and W. Weighel, contractor, and A. H. Boomer, and H. Wadsworth, and R. McMurray, all of San Francisco, Cal., as his sureties:

Witnesseth, that whereas W. Weighel has been accepted as contractor for transporting the mails on route No. 235001, being the covered regulation wagon mail messenger, transfer, and mail station service at the city of Chicago, Ill., under an advertisement issued by the Postmaster-General on the 15 day of September, 1894, for such service, which advertisement is hereby referred to, and made by such reference a part of this contract, and for performing all new or additional service of said kinds which may at any time during the term of this contract be required in said city, at seventy-two thousand four hundred dollars per year, for and during the term beginning the first day of July, 1895, and ending June 30, 1899:

Now, therefore, the said contractor and his sureties do, jointly and severally, undertake, covenant, and agree with the United States of America, and do bind themselves—

First. To carry said mail, using therefor wagons of the kind hereinafter described in sufficient number to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this contract, and within the time fixed in the pamphlet advertisement of the Postmaster-General dated September 15, 1894; and so to carry until said schedule is altered by the authority of the Postmaster-General, as herein provided, and then to carry according to such altered schedule; to carry said mails in a safe and secure manner, free from wet or other injury, in substantial one or two horse wagons of sufficient capacity for the entire mail; the wagons to be employed in the performance of the service to be built with closed bodies and in accordance with the plans and specifications adopted by the Postmaster-General September 1, 1894, which plans and specifications are hereby referred to and made by such reference a part of this contract. All equipment to be kept clean, the wagons to be frequently washed and kept painted and varnished in a thorough manner. The locks to be used to be similar in make and pattern to those on exhibition at the office of the Second Assistant Postmaster-General, the mechanism of the lock to be such as to give ample security to the mails. The painting, as to colors, ornaments, and design, both on running gear and body, shall conform to the painting and ornamenting shown in the colored drawings on exhibition at the office of the Second Assistant Postmaster-General.

166 at Washington, D. C. The Postmaster-General reserves the right to vary at any time, when in his judgment the service may require it, the plan and form of wagons to be used in the service, provided the changes in plan and form of wagons do not involve the discontinuance of the wagons then in use, and approved by him.

Second. To take the mail from, and deliver it into, the post-offices, mail stations and cars at such points, and at such hours, under the directions of the postmaster at Chicago, Ill., approved by the Postmaster-General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage.

Third. To furnish the number of regulation wagons that, in the opinion of the postmaster at Chicago, Ill., will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable, delayed waiting for trains, or withdrawn from service for repairs.

Fourth. To be accountable and answerable in damages to the United States, or any person aggrieved, for the faithful performance by the said contractor of all the duties and obligations herein assumed, or which are now or may hereafter be imposed upon him by law in this behalf; and, further, to be so answerable and accountable in damages for the careful and faithful conduct of the person or persons who may be employed by said contractor and to whom the said contractor shall commit the care and transportation of the mails, and for the faithful performance of the duties which are or may be by law imposed upon such person or persons in the care and trans-

portation of said mails; and, further, that said contractor shall not commit the care and transportation of the mail to any person under sixteen years of age, nor to any person not of good moral character, or who has not taken the oath prescribed by law, or who can not read and write the English language. Each driver shall wear when on duty the prescribed cap or hat described in the pamphlet advertisement of September 15, 1894.

Fifth. To discharge any driver, or other person employed in performing mail service, wherever required by the Postmaster-General so to do; not to transmit by themselves, or any of them, or any of their agents, or be concerned in transmitting, commercial intelligence more rapidly than by mail; not to carry, otherwise than in the mail, letters, packets, or newspapers which should go by mail.

167 Sixth. To account for and pay over any money belonging to the United States which may come into the possession of the contractor, his sureties, or employes.

Seventh. That foreign mails in transit across the territory of the United States shall, within the meaning of this contract, be deemed and taken to be mails of the United States.

Eighth. To carry post-office blanks, mail locks, and mail bags, and all other postal supplies.

Ninth. To convey, whenever requested so to do, one railway post-office clerk, a substitute, or a messenger, on the driver's seat of each wagon.

Tenth. To perform all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station service that the Postmaster-General may order at the city of Chicago, Ill., during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster-General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster-General may require, as a part of such new or additional service.

For which service, when properly performed, and the evidence thereof shall have been filed in the office of the Second Assistant Postmaster-General, the said W. Weighel, contractor, is to be paid by the United States the sum of seventy-two thousand four hundred dollars a year, to wit: Quarterly, in the months of November, February, May, and August, through the postmaster at the city of Chicago, Ill., or otherwise, at the option of the Postmaster-General; said pay to be subject, however, to be reduced or discontinued by the Postmaster-General, as hereinafter stipulated, or to be suspended and withheld in case of delinquency.

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the

service thereon, without change of pay; and that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity.

168 And it is further stipulated and agreed, that for a failure to deliver not beyond the control of the contractor, or for any delay or interference with the prompt delivery of the mail at the post-office, mail stations, depots, and landings, or for carrying the mail in a manner different or inferior to that hereinbefore specified; for suffering the mail to be wet, injured, lost, or destroyed; or for any other delinquency or omission of duty under this contract; for all or any of which the contractor shall forfeit, and there may be withheld from his pay, such sum as the Postmaster-General may impose as fines or deductions, according to the nature and frequency of the failure or delinquency.

And it is further stipulated and agreed, that the Postmaster-General may annul this contract for repeated failures; for violating the postal laws; for disobeying the instructions of the Post-Office Department; for refusing to discharge a carrier or any other person employed in the performance of service, when required by the Department; for transmitting commercial intelligence or matter that should go by mail, contrary to the stipulations herein; for transporting persons so engaged as aforesaid; whenever the contractor shall become a postmaster, assistant postmaster, or member of Congress; and whenever, in the opinion of the Postmaster-General, the service can not be safely performed, the revenues collected, or the laws maintained.

And it is further stipulated and agreed, that such annulment shall not impair the right of the United States to claim damages from said contractor and his sureties under this contract; but such damages may, for the purpose of set-off or counterclaim, in the settlement of any claim of said contractor or his sureties against the United States, whether arising under this contract or otherwise, be assessed and liquidated by the Auditor of the Treasury for the Post-Office Department.

And it is hereby further stipulated and agreed by the said contractor and his sureties that this contract may, in the discretion of the Postmaster-General, be continued in force beyond its express terms for a period not exceeding six months, until a new contract with the same or another contractor shall be made by the Postmaster-General.

And it is further stipulated, that no Member of, or Delegate to, Congress shall be admitted to any share or part of this contract, or to any benefit to arise therefrom.

169 And this contract is further to be subject to all the conditions imposed by law and the several acts of Congress relating to post-offices and post roads.

In witness whereof, the said Postmaster-General has caused the seal of the Post-Office Department to be hereto affixed, and has caused the same to be attested by the signature of the Second Assistant Post-

master-General, in accordance with the act of Congress approved March 3, 1877 (sec. 3, 19 Stats., p. 335), and the said contractor and his sureties have hereunto set their hands and seals the day and year set opposite their names, respectively.

By order of the Postmaster-General: C. NEILSON,
Second Assistant Postmaster-General.

Signed, sealed, and delivered by the Second Assistant Postmaster-General in the presence of—

J. T. CALLAGHAN.

Signed this 15th day of Feby, 1895.

And by the other parties hereto in the presence of—

W. P. HASSELL,

E. B. YOUNG,

Witnesses.

Signed this 4th day of Jan'y, 1895.

W. WEIGHEL, [SEAL.]
Contractor.

Signed this 17th day of January, 1895.

A. H. BOOMER, [SEAL.]

Signed this 17th day of January, 1895.

H. WADSWORTH, [SEAL.]

Signed this 17th day of January, 1895.

R. McMURRAY, [SEAL.]

} *Sureties.*

Post-Office at San Francisco, Cal.,
January 19th, 1895.

I hereby certify that I am acquainted with A. H. Boomer, and H. Wadsworth, and R. McMurray, all of San Francisco, Cal., and the condition of their property, and that, after full investigation and inquiry, I am satisfied that they are good and sufficient sureties for the amount in the foregoing contract.

FRANK MCCOPPIN, *Postmaster.*

NOTE.—This certificate must be signed by a postmaster and not by any other person.

IMPORTANT.—The oath on the next page must be taken by the contractor.

Certificate of the Oath of Mail Contractors and Carriers.

Required by Act of Congress of March 5, 1874.

☞ (Take this oath after signing the foregoing contract.)

I, W. Weighel, being "employed in the care, custody, and conveyance of the mail" as contractor on route No. 235001, being cov-

ered regulation wagon mail messenger, transfer, and mail station service at Chicago, State of Ill., do solemnly swear that I will faithfully perform all the duties required of me, and abstain from everything forbidden by the laws in relation to the establishment of post-offices and post roads within the United States; and that I will honestly and truly account for and pay over any money belonging to the said United States which may come into my possession or control. And I also further swear that I will support the Constitution of the United States: So help me God.

W. WEIGHEL,
Contractor.

COUNTY OF SAN FRANCISCO,
State of California, ss:

Sworn before the subscriber, a notary public at San Francisco, the county and State aforesaid, this 19th day of January, A. D. 1895, and I also certify that the person above named is above the age of twenty-one years, to the best of my knowledge and belief.

[SEAL.]


GEO. T. KNOX,
*Notary Public in and for the City and County
of San Francisco, State of California.*

170½

Oath of Sureties.

NOTE.—A postmaster is not qualified to administer this oath.

STATE OF ———,
County of ———, ss:

Personally appeared before me this day the sureties in the foregoing contract, to me known to be the persons named in said contract as sureties, and who have executed the same as such, who, being by me duly sworn, depose and say, and each for himself deposes and says, he has executed the within contract; that his place of residence is correctly stated therein; that he is the owner of real estate worth the sum named in said contract over and above all debts due and owing by him, and all judgments, mortgages, and executions against him after allowing all exemptions of every character whatever.  And also over and above the amount of any and all other contracts for carrying the mail which he has executed as surety, and which have not heretofore expired, the total sum thus assured amounting to double the amount of the foregoing contract.

Sureties sign here.

{

Subscribed and sworn to before me this — day of ———, 189—,
_____, [L. S.]

NOTE.—When either of the above oaths is taken before a justice of the peace or any other officer not using a seal, except a judge of a United States court, the certificate of the clerk of a court of record must be added, under his seal of office, that the person who administered the oath is duly qualified as such officer. If the oath is taken before a notary public and his seal is affixed, the certificate of the clerk of the court is not necessary.

171 X. *Argument and Submission of Case.*

On December 9, 1919, this case was argued and submitted by Messrs. A. R. Serven and Albert C. Travis, for the claimant, and Messrs. George M. Anderson and Joseph Stewart, for the defendants.

It was agreed by Counsel, that Judge Downey, who was absent at the argument of the case should participate in the decision of the Court.

172 XI. *Findings of Fact, Conclusions of Law, and Opinion of the Court by Hay, J.*

Entered January 26, 1920.

Court of Claims of the United States.

No. 22532.

(Decided January 26, 1920.)

Deceased,

CHARLES F. HUNT, Executor of the Estate of William Weighel,

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of Fact.

I.

On September 15, 1894, the Postmaster General of the United States had published an advertisement inviting proposals for the performance of covered regulation mail messenger, transfer, and mail station service in Chicago, Ill., on mail route No. 235001 for the period from the 1st day of July, 1895, to the 30th day of June, 1899; the parts of said advertisement relating to said route, including instructions to bidders, are set out in Exhibit A attached to and made a part of the plaintiff's amended petition. Pursuant to said advertisement, the plaintiff's decedent (William Weighel) submitted a proposal for the performance of the service described in said ad-

vertisement for the sum of \$72,400 per annum. The bid of the plaintiff was accepted, and on the 17th day of January, 1895, the plaintiff and the defendants entered into a contract in writing for the performance of said service, a copy of which contract is attached to the amendment of the plaintiff's amended petition, and is made a part of this finding by reference. On February 6, 1895, William Weighel the aforesaid contractor, entered into a subcontract with one Ezra J. Travis, by which contract the said Travis agreed for the sum of \$70,000 per annum to carry the United States mail on route No. 235001 in the city of Chicago, relieving the said Weighel of the labor and responsibility of his contract. The said Travis bound himself in the sum of \$100,000 to assume all liability of fines and deductions which might be imposed on said Weighel under his contract for failure and delinquencies in the performance of the service on said route. The said Travis performed all the mail service under the contract, and the extra service, to recover which this suit was brought. The said Weighel had nothing further to do with the performance of said contract; the said Weighel turned over to the said Travis the sum of \$72,400 per annum which was paid to said Weighel by the defendants, and received from Travis the sum of \$2,400 per annum.

173

II.

At the time the plaintiff's decedent bid on this route no mail service in the city of Chicago was being performed to and from the street cars by contractors who were performing the same mail service which was bid for by the plaintiff's decedent, nor did the proposal of the defendants for mail service on this route mention service to and from street cars, although the proposal to bidders published by the defendants for the period beginning July 1, 1899, did mention specifically electric and cable cars. The plaintiff's decedent, through his agent, was informed by the postmaster at Chicago, who was authorized by the Postmaster General of the United States to give information to bidders, that the bidder obtaining the contract for the performance of mail service on route 235001 for the period set out in Finding I would not be required to perform mail service to and from street cars.

III.

During the period covered by the contract the subcontractor, Travis, performed the service described and referred to in the advertisement and covered by the contract, for which service he has been paid the amount specified in said contract. He also performed new and additional service of the same kind and character for which he asks no additional compensation. The last-mentioned service was occasioned by a change of the location of the general post office in Chicago and by the establishment of certain mail stations and substations.

IV.

Under the dates of November 14, 1895, May 12, 1896, February 27, 1897, and May 3, 1897, the Postmaster General issued orders requiring the contractor to perform mail service to and from street cars in the city of Chicago. As a result of these orders the subcontractor had to make to and from street cars 523,276 trips. These orders are made a part of the petition. The service required by these orders was performed under protest, and the contractor notified the defendants that compensation therefor would be demanded.

The service required by the aforesaid orders entailed 25,550 days' work for one man; and after the service required by said orders began the subcontractor was obliged to employ 24 men, 4 double vans, and 7 single wagons to perform the service, which had been previously performed by 4 drivers and 4 single wagons. The fair and reasonable value of the service rendered by the subcontractor and his agents in the making of the trips imposed upon him by the orders of the Postmaster General to and from street cars was \$52,327.60. The subcontractor, Travis, has never received anything for the extra service performed.

174

VI.

Both the postmaster at Chicago and the Second Assistant Postmaster-General of the United States were informed that Weighel had sublet the contract aforesaid to Travis. Travis was recognized by the Post Office Department as subcontractor, although no copy of the subcontract was filed with the Second Assistant Postmaster General as required by law, the said Travis having informed that official under date of October 4, 1895, that his subcontract with Weighel "is not intended to be filed for recognition by the Department, or as a lien against the pay of the contractor." Notwithstanding this, the Second Assistant Postmaster General recognized the said Travis as subcontractor, and, under date of August 23, 1899, wrote him that the sum of \$55.50 "will be deducted from your pay as subcontractor on said route, in accordance with the terms of your subcontract."

VII.

On April 18, 1901, William Weighel, filed a petition in this court; and on August 6, 1907, the said Travis filed an amended petition in this suit in his own right, substituting himself as plaintiff. In this petition Travis stated that he had performed the extra service set out by Weighel in his petition. The petition of Travis was dismissed on the ground that his claim was barred by the statute of limitations. Whereupon Weighel's executor amended the petition of April 18, 1901, and upon that amended petition and the evidence taken in the case this suit now comes up for trial.

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and that his petition should be and the same is hereby dismissed. Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be entered by the chief clerk and collected by him in the manner prescribed by law.

Opinion.

HAY, Judge, delivered the opinion of the court:

This is a suit brought by the executor of the estate of William Weighel, deceased, for the sum of \$52,327.60. On the 17th day of January, 1895, William Weighel entered into a contract with the Postmaster General of the United States to perform covered regulation mail messenger, transfer, and mail station service in Chicago, Ill., on mail route No. 235001 for the period from the 1st day of July, 1895, to the 30th day of June, 1899. Among other things the contract provided: "To carry said mail, using therefor wagons of the kind hereinafter described in sufficient number to transport the whole of said mail, whatever may be its size, weight, or increase during the term of this contract * * * and so to carry until said schedule is altered by the authority of the Postmaster General" * * * and

175 "to perform all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station service that the Postmaster General may order at the city of Chicago, Ill., during the contract term, without additional compensation, whether caused by change of location of post office, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service." And the contract further provided: "It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance."

At the time the contractor Weighel bid on this route, and entered into the contract with the Government, no mail service in the city of Chicago was being performed to and from street cars by contractors who were performing the same mail service which was bid for by the said contractor, nor did the proposal of the defendants for mail service on this route mention service to and from street cars, although the proposal to bidders published by the defendants for the period beginning July 1, 1899, did mention specifically electric and cable

cars. The aforesaid contractor, through his agent, was informed by the postmaster of Chicago, who was authorized by the Postmaster General of the United States to give information to bidders, that the bidder obtaining the contract for the performance of mail service on route 235001 for the period set out in Finding I would not be required to perform mail service to and from street cars.

During the period covered by the contract, the subcontractor performed the service required by the contract, and all new and additional service of the kind and character referred to in the advertisement and the contract for this service the subcontractor has been paid.

Under orders issued by the Postmaster General, which orders are set out in the findings, the subcontractor was required to perform mail service to and from street cars in the city of Chicago. As a result of these orders the subcontractor had to make to and from street cars 523,276 trips, and was obliged to employ 24 men, 4 double vans, and 7 single wagons to perform the service, which had been previously performed by 4 drivers and 4 single wagons, all of which greatly increased the expense of the service, and imposed upon him duties and undertakings which were not contemplated in the contract. The value of the service rendered by the subcontractor in the making of the trips imposed upon him by the orders of the Postmaster General to and from street cars was \$52,327.60, no part of which amount has been paid to the subcontractor nor to anyone else. The service was performed under protest, and the contractor notified the defendants that compensation therefor would be demanded. The Government contends that the Postmaster General under the authority conferred upon him by the contract in this case had a right to require the contractor to render new or additional mail messenger or transfer service, and that the trips to and from street cars was such new and additional service was provided for in the contract. We do
176 not think so. The service required was of an entirely different nature from that described in the contract, imposed upon the contractor very great burdens, and involved him in great expense which he could not have foreseen or guarded against when he entered into the contract.

We think this case is governed by the principles laid down by the Supreme Court of the United States in the case of *United States v. Stage Company*, 199 U. S. 414, 422, 423, and if the plaintiff's decedent in this case had performed the services for which he brings suit, we would not hesitate to render a judgment in his favor. But it appears from the evidence in this case that Weighel the contractor, on February 6, 1895, sublet his contract to one Travis, who agreed to perform all the service which was required of Weighel by his contract with the Government. Travis complied with the terms of his subcontract; he also performed all the service under Weighel's contract with the department, and was recognized by the department subcontractor. Weighel had no further interest in the contract, except that he paid over to Travis the sum of \$72,400 per annum, which the Government paid him as the original contractor. The

trips which were made to and from the street cars were made by Travis, the expense- imposed by reason of these trips were paid by Travis; all this extra service, which is the subject of this suit, was performed by Travis, the subcontractor. It was not claimed by Weighel, nor does his personal representative claim, that Weighel performed this extra service.

It is unfortunate that Travis did not sue in his own name, or that Weighel did not sue for the benefit of Travis. After the suit brought by Weighel had been pending in this court for over six years, it seems to have occurred to Travis that Weighel did not have a cause of action, and he therefore undertook to sue in his own name, but it was held that he was too late, that he was barred by the statute of limitations, and his suit had to be dismissed. Had he brought his suit in time, or if Weighel had sued for his benefit in the first place, it is difficult to perceive how he could have been defeated. As the matter stands, it clearly appears that Weighel has no interest in the subject matter of this suit; therefore his executor can not maintain it, and his petition must be dismissed.

Graham, Judge, Downey, Judge, Booth, Judge, and Campbell, Chief Justice, concur.

177

XII. *Judgment of the Court.*

At a Court of Claims, held in the City of Washington, on the 26th day of January, A. D., 1920, judgment was ordered to be entered as follows: The Court, upon the consideration of the premises, find in favor of the defendants and it is ordered, adjudged and decreed that Charles F. Hunt, Executor of the estate of William Weighel, Deceased, as aforesaid, is not entitled to recover and shall not have a recovery of any sum in this action from the United States; and that the petition herein be and it is hereby dismissed; and it is further ordered, adjudged and decreed that the United States shall have a recovery of and from Charles F. Hunt, Executor of the estate of William Weighel, Deceased, as aforesaid, the sum of fifty-three dollars and twenty-two cents (\$53.22), the cost of printing the record in this cause in this court, to be collected by the Clerk as provided by law.

By THE COURT.

178 XIII. *Claimant's Application for an Allowance of an Appeal.*

Comes now the claimant, by his attorneys, in the above entitled cause and prays this Honorable Court that an appeal be granted therein to the Supreme Court of the United States.

CHARLES F. HUNT,

Executor,

By A. R. SERVEN,

His Attorney.

Filed April 12, 1920.

Ordered: That the above appeal be allowed as prayed for.
By THE COURT.

Apr. 19, 1920.

Court of Claims.

No. 22432.

CHARLES F. HUNT, Executor of the Estate of William Weighel,
Deceased,

VS.

THE UNITED STATES.

I, F. C. Kleinschmidt, Assistant Clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above entitled cause; of the opinion of the Court on demurrer by Barney, J., of the argument and submission of the cause; of the findings of fact; conclusion of law; opinion of the Court by Hay, J.; of the judgment; of the application of the claimant for and the allowance of an appeal to the Supreme Court of the United States.

179 In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington City, this twenty-third day of April, A. D., 1920.

[Seal of the Court.]

(Signed)

F. C. KLEINSCHMIDT,
Assistant Clerk, Court of Claims.

180 Supreme Court of the United States.

No. —.

CHARLES F. HUNT, Executor of the Estate of William Weighel,
Deceased, Appellant,

VS.

THE UNITED STATES.

Appeal from the Court of Claims.

Stipulation.

It is stipulated and agreed between the parties hereto by their attorneys that the several parts of the record certified to the Supreme Court by the Court of Claims herein which are crossed out, in blue pencil, in the attached copy, are unnecessary for the proper understanding of the case by the Supreme Court, and that the record hereto attached contains all that is necessary for a proper understanding of the issues involved herein and that the same may be printed as the record on appeal in this case.

It is further stipulated and agreed that either party hereto may print in his brief, or briefs, filed herein any part of the record filed by the Court of Claims herein, provided, that notice of intention so to do is given to the other party within three months from 181 - date hereof and that if the party so served with notice desires to incorporate other parts of the record aforesaid, he may do so, provided, notice is given within thirty days after service of the first notice above mentioned.

BURT E. BARLOW,
Attorneys for Appellee.

JOSEPH STEWART,
Attorneys for Appellee,
Special Assistant to the Attorney General.

Dated: August 3, 1920.

[Endorsed:] File No. 27,636. Supreme Court U. S., October Term, 1920. Term No. 313. Charles F. Hunt, executor, &c., appellant, vs. The United States. Agreed record. Filed August 4, 1920.

(2461)

FILED

MAR 22 1921

JAMES D. WAHER

CLERK

IN THE

Supreme Court of the United States

October Term, 1920.

No. 38

CHARLES F. HUNT, EXHIBITOR OF THE BUZZ OF
WILLIAM WAGNER, DECEASED, Appellant,

vs.

THE UNITED STATES, Appellee.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

A. R. BEEVEN

BURT E. BARLOW,

A. C. TRAVIS

Attorneys for Appellant.

TABLE OF CONTENTS

	PAGE
Statement of Facts.....	1-5
Assignment of Errors.....	5
Argument	5-29
I. Right of action vested in Weighel.....	5-10
Service sued for requested of Weighel and performed by him.....	5, 6
Service sued for not covered by contract	6
Service sued for of different character than that covered by contract.....	6, 7
Service performed under protest.....	6
Performance by subcontractor is per- formance by contractor.....	7, 8
Construction placed upon performance by parties	8
Subcontract never filed and subcontra- ctor acquired no rights.....	8, 9
The right of action vested in Weighel..	9
II. Service sued for not covered by contract..	10-17
(a) Service sued for expressly excluded from contract	10-13
Contract made advertisement part thereof	10, 11
Advertisement directed bidders in- quire Postmaster	11
Postmaster represented service later required not covered by contract	11, 12
Discussion <i>Hollerbach vs. U. S.</i> and <i>Christie vs. U. S.</i>	12, 13
Discussion <i>Utah, Nevada & Califor- nia Stage Co. vs. U. S.</i>	13
<i>Simpson vs. U. S.</i> distinguished from above cases.....	14
(b) Great increase in service not con- templated by defendants or contractor and not covered by contract.....	14, 15

	PAGE
Application of Utah, Nevada & California State Co. case.....	15, 16
(c) <i>Slavens</i> and <i>Proffit</i> cases discussed and distinguished from present case.	16, 17
III. Travis had no right of action against defendants	18-25
He acquired no rights:	
(1) By express contract.....	19
(2) By implied contract.....	18-20
(3) By novation	20, 21
(4) By assignment	21, 22
(5) Under 22 Stat. L. 53.....	22
(6) Under 20 Stat. L. 62.....	22
Statute prescribes manner of recognition of subcontractor.....	22, 23
Statutory method must be followed	23
Government officials cannot confer right of suit except in accordance with statutory method	23, 24
IV. Petition by subcontractor has no bearing on this case.....	25
V. Claimant and his decedent have continuously asserted their rights.....	25, 26
VI. Discussion of the opinion of the lower court	26, 27
(1) Departmental recognition does not take the place of statutory requirements	26
(2) Performance by subcontractor is performance by contractor.....	26, 27
(3) The fact that Weighel had not paid Travis does not affect Weighel's right to sue defendants.....	27
Conclusion:	
Right of action vested in Weighel.....	27, 28
Travis was neither a necessary or admissible party	28
Discussion <i>Cole</i> vs. <i>Ralph</i>	28, 29

Index Continued

iii

LIST OF CITATIONS

	PAGE
Arkansas Smelting Co. vs. Belden Mining Co., 127 U. S., 379.....	18
Carr vs. United States, 98 U. S., 433.....	24
Case vs. Terrell, 78 U. S., 199.....	24
Christie vs. United States, 237 U. S., 234.....	6, 13
Cole vs. Ralph, 252 U. S., 286.....	28
Coleman vs. United States, 152 U. S., 96.....	19
Conti vs. Johnson <i>et al.</i> , 91 Vt., 467.....	8
Cye., 30, 77.....	28
Elliott on Contracts, Vol. 2, 609, Sec. 1365.....	19
Harley vs. United States 198 U. S., 229.....	20
Hollerbach vs. United States, 233 U. S., 165...	6, 12
Kellogg vs. United States, 7 Wall., 361.....	8
Proffit, Samuel G. vs. United States, 42 Ct. Cl., 248	16, 17
Rock Island, Arkansas & Louisiana R. R. Co. vs. United States, Adv. Ops. Oct. Term, 1920, 66	23
Slavens, Luther Clay vs. United States, 38 Ct. Cl. 576, 196 U. S., 229.....	16, 17
Simpson vs. United States, 172 U. S., 372.....	14
Stanley vs. Schwalby, 162 U. S., 255.....	23, 24
United States vs. Atlantic Dredging Co., 253 U. S., 11.....	6, 13
United States vs. Driscoll, 96 U. S., 421.....	8
United States vs. Lee, 106 U. S., 196.....	24
United States vs. Spearin, 248 U. S., 132.....	6, 13
United States vs. Utah, Nevada & California Stage Co., 199 U. S., 414.....	6, 7, 13, 15

APPENDIX

Chap. 116, 22 Stat. L. 53.....	20, 22
Sec. 2, 20 Stat. L. 62.....	30
Sec. 3, 20 Stat. L. 62.....	22, 27
Sec. 3477, U. S. R. S.	22
Sec. 3963, U. S. R. S.	21

IN THE
Supreme Court of the United States

OCTOBER TERM, 1920.

No. 313.

CHARLES F. HUNT, EXECUTOR OF THE ESTATE OF
WILLIAM WEIGHEL, DECEASED, *Appellant*,

vs.

THE UNITED STATES, *Appellee*.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANT.

STATEMENT OF FACTS

This case comes before this Court upon appeal by claimant from a judgment of the Court of Claims in favor of the defendants and dismissing appellant's petition. The Court of Claims found that a cause of action against the defendants existed but that it did

not exist in claimant's decedent. The appeal, therefore, presents but one question, namely, whether there existed in appellant's decedent a right of action against the United States.

William Weighel, on January 17, 1895, entered into a contract with the United States to transport United States mail on Route No. 235001, at Chicago, Illinois, for a period of four years from July 1, 1895 (Finding I, Rec., p. 61). Under dates of November 14, 1895, May 12, 1896, February 27, 1897, and May 3, 1897, the Postmaster-General issued orders requiring Weighel to perform the extra service here sued for, claiming that it was covered by the contract (Finding IV, Rec., p. 63). Such service was not mentioned in the defendants' advertisement under which Weighel bid, and, at the time Weighel submitted his bid, was not being performed by mail contractors who were performing the service for which Weighel bid (Finding II, Rec., p. 62). Furthermore, the defendants expressly represented to Weighel before he submitted his bid that the successful bidder would not be required to perform it (Finding II, Rec., p. 62). Weighel protested that this service was not called for by his contract and served notice upon defendants that compensation therefor would be demanded. The service required by these orders entailed 523,276 trips and 25,550 days' work for one man, necessitating the employment of 24 men, 4 double vans and 7 single wagons to perform service previously performed by 4 drivers and 4 single wagons (Finding IV, Rec., p. 63). The Court of Claims has found that this service was of the fair and reasonable value of \$52,327.60, no part of which has ever been paid by the defendants (Finding IV, Rec., p. 63; Opinion, Rec., p. 65). Weighel, under

date of February 6, 1895, which was prior to the commencement of the contract-term and prior to the service of said orders, employed Ezra J. Travis as subcontractor to perform the service covered by the contract between Weighel and the defendants, Weighel agreeing to pay him \$70,000 per annum and Travis binding himself to Weighel in the sum of \$100,000 to perform said service, liability for all fines and deductions imposed upon Weighel to be borne by Travis (Finding I, Rec., p. 62; subcontract, Rec., p. 24). In pursuance of the subcontract between Weighel and the subcontractor, the subcontractor performed the service covered by Weighel's contract with the defendants, and as a result of said orders performed also the above-described service required by the orders (Finding I, Rec., p. 62; Finding IV, Rec., p. 63). The defendants paid Weighel the entire \$72,400 per annum called for by the contract between the defendants and Weighel, and Weighel paid his subcontractor the \$70,000 per annum called for by the subcontract between Weighel and the subcontractor (Finding I, Rec., p. 62; subcontract, Rec., p. 24). The subcontract was entered into with the knowledge of the Postmaster-General. The subcontract was not filed with the Second Assistant Postmaster-General in accordance with the statute that defines the terms under which a subcontractor may acquire the right to be paid by the United States, and the subcontractor, under date of October 4, 1895, in writing, informed the Second Assistant Postmaster-General that his subcontract with Weighel "is not intended to be filed for recognition by the Department, or as a lien against the pay of the contractor" (Finding VI, Rec., p. 63). The Second Assistant Postmaster-General recognized that Travis

was the subcontractor under his subcontract with Weighel, but not a subcontractor to whom the United States could make payment for services, the statute not having been complied with, and all payments were made direct to Weighel and he in turn paid Travis (Finding VI, Rec., p. 63; Finding I, Rec., p. 62). After the expiration of the contract-term, the Second Assistant Postmaster-General wrote Travis that the sum of \$55.50 "will be deducted from your pay as subcontractor on said route, in accordance with the terms of your subcontract." This deduction, however, if made, was made from the contractor's pay, as all payments by the defendants were made to the contractor and none to the subcontractor (Finding I, Rec., p. 62).

On April 18, 1901, claimant's decedent filed his petition herein in the Court of Claims. On August 6, 1907, the subcontractor filed a petition to be substituted as plaintiff, alleging that Weighel had become burdened by debts and judgments to large amounts and had died, and that the subcontractor was uncertain as to the course he might properly pursue (Finding VII, Rec., p. 63; Rec., p. 22, par. 14). Said petition was dismissed on demurrer (Rec., p. 32). Weighel's prior petition was amended by his executor, and upon the latter petition the cause was heard in the Court of Claims.

No appeal is taken from the finding by the Court of Claims that extra service was rendered for which no compensation has been paid by the United States, and that the value of such extra service is \$52,327.60.

The Court of Claims has found, however, that, as a matter of law, the right of action for the recovery of the sum due for said extra service does not exist in

William Weighel, or in his personal representative (claimant), but existed in the subcontractor. Exception is taken to this determination by the Court of Claims and appeal is taken therefrom.

ASSIGNMENT OF ERRORS.

- (I) The court erred in dismissing claimant's petition.
- (II) The court erred in finding, as a matter of law, that the right of action sued upon was not in claimant.
- (III) The court erred upon the facts found in not entering judgment for claimant.

ARGUMENT.

I.

THE RIGHT OF ACTION VESTED IN WEIGHEL AND REMAINED IN HIM UNTIL HIS DEATH AND NOW IS IN HIS PERSONAL REPRESENTATIVE (CLAIMANT).

William Weighel, while the contractor with the United States for the performance of mail service upon Route No. 235001 in the City of Chicago for the term from July 1, 1895, to June 30, 1899, received, as such contractor, orders from the defendants to perform the service here sued for (Finding I, Rec, pp. 61. 62; Finding IV, Rec., p. 63).

Each of said orders issued to Weighel contained the following language:

“Require contractor to perform service as follows (or more frequently, if necessary) without additional pay, in accordance with the terms of

his contract'' (Finding IV, Rec., p. 63; Rec., pp. 43, 46, 47).

Weighel protested that the service so ordered was not covered by the contract and that compensation therefore would be demanded (Finding IV, Rec., p. 63).

Compliance with said orders, if the service demanded thereby was not covered by Weighel's contract, raised an implied promise by the defendants to pay to Weighel the fair and reasonable value thereof.

The defendants expressly represented to Weighel when he bid for the contract that the bidder obtaining the contract would not be required to perform the service so ordered (Finding II, Rec., p. 62; Opinion, Rec., p. 65).

Numerous decisions by this Court have established that such a representation takes such service out of the terms of the contract, and upon performance thereof, vests a right of action for compensation therefor in the contractor.

United States vs. U. N. & C. Stage Co., 199 U. S. 414, 424.

Hollerbach vs. United States, 233 U. S. 165.

Christie vs. United States, 237 U. S. 234.

United States vs. Spearin, 248 U. S. 132.

United States vs. Atlantic Dredging Co., 253 U. S. 11.

The performance of said service entailed 523,276 trips and 25,550 days' work for one man, necessitating, during a period of approximately three and a-half years, the employment of 24 men, 4 double vans and

7 single wagons to perform service which had previously been performed by 4 drivers and 4 single wagons. (Finding IV, Rec., p. 63.)

The Court of Claims has held that the service so ordered was "of an entirely different nature from that described in the contract, imposed upon the contractor very great burdens, and involved him in great expense which he could not have foreseen or guarded against when he entered into the contract." (Rec., p. 65.)

That holding is clearly substantiated by the facts cited and, it is submitted, establishes an additional ground of recovery under the doctrine of

United States vs. U. N. & C. Stage Co., 199 U. S. 414, 422, 423,

and the Court of Claims so held.

Weighel, before the commencement of his contract-term and before the orders referred to were issued, and with the knowledge of the defendants, employed Ezra J. Travis as subcontractor under a separate contract in which Weighel agreed to pay Travis \$70,000 per annum to perform the service which Weighel was under contract to perform for the defendants. (Finding I, Rec., p. 62; Finding VI, Rec., p. 63.)

The Court of Claims has found that in pursuance of the subcontract between Weighel and the subcontractor, the subcontractor performed the service covered by Weighel's contract with the defendants, and that in pursuance of said orders the subcontractor performed also the above-described service required by the orders (Finding IV, Rec., p. 63).

It is axiomatic in law that performance by a subcontractor is performance by the contractor, in the same manner that performance by an agent or em-

ployee is performance by the principal or employer, and that the right of action based thereon vests solely in the contractor.

United States vs. Driscoll, 96 U. S. 421.

Kellogg vs. United States, 7 Wall. 361.

Conti vs. Johnson et al., 91 Vt. 467, 472.

Furthermore, that the parties themselves, and also the subcontractor, adopted the rule announced in said cases, is shown by the fact that the defendants, throughout the contract-term, with knowledge that the service was being performed by the subcontractor, paid to the contractor (claimant's decedent) the entire contract-pay of \$72,400 per annum, thereby conclusively demonstrating their acceptance of performance by the subcontractor as performance by the contractor. (Finding I, Rec., p. 62; Finding VI, Rec. p. 63.) As it is evident from the language of the orders above-quoted, that the defendants in ordering Weighel to perform the service sued for, "in accordance with the terms of his contract," considered the service so ordered as covered by Weighel's contract with them, they also accepted performance of such service by the subcontractor as performance by the contractor.

As the subcontract was never filed (Finding VI, Rec., p. 63), the subcontractor acquired no rights under the statute providing in certain cases for payment to a subcontractor by the defendants out of the contractor's pay. (Finding VI, Rec., p. 63.) Furthermore, the subcontractor expressly disaffirmed in writing to the defendants before the issuance of the orders in question any rights he could have acquired by complying with the statute. (Finding VI, Rec., p. 63.)

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1921

No. 38

CHARLES F. HUNT, Executor of the Estate of
William Weighel, Deceased, Appellant,
vs.

THE UNITED STATES, Appellee.

Appeal from the Court of Claims.

ADDENDA TO
APPELLANT'S BRIEF. --page 8

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1215 Broadway, New York, N. Y.

1911

RECEIVED

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
1215 Broadway, New York, N. Y.

1911

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
1215 Broadway, New York, N. Y.

1911

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
1215 Broadway, New York, N. Y.

1911

NO RIGHT OF ACTION VESTED IN THE SUB-
CONTRACTOR

See Richmond Railway & Electric Co.
v. Harris, 32 S.E. 458;

Baker v. McMurry Contracting Company,
223 S.W. 45, 48;

Mott v. Wright et al, etc., 184 Pac.517;

Horne v. McRae, 53 So. C. 51, 30
S.E. 701.

THE FACT THAT THE SUBCONTRACTOR HAS NOT BEEN
PAID BY THE CONTRACTOR CANNOT DEPRIVE THE
CONTRACTOR OF HIS RIGHT OF ACTION

See Mathesius v. Brooklyn Heights R. Co.,
96 Fed. 792;

Dugue v. Levy, 120 Louisiana 370.

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1710 BROADWAY, NEW YORK

THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
1710 BROADWAY, NEW YORK
THE NEW YORK PUBLIC LIBRARY
ASTOR LENOX TILDEN FOUNDATION
1710 BROADWAY, NEW YORK

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1710 BROADWAY, NEW YORK

THE NEW YORK PUBLIC LIBRARY

ASTOR LENOX TILDEN FOUNDATION

1710 BROADWAY, NEW YORK

Although the defendants paid to Weighel his entire contract-pay of \$72,400 per annum for the service called for by his contract with the defendants, which service was performed by his subcontractor, they have not paid to Weighel or to anyone else any compensation for the service rendered in pursuance of said orders, which service was also performed by the subcontractor under the claim by the defendants that it was covered by the contract and under protest by the contractor (claimant's decedent). (Finding I, Rec., p. 62; Finding III, Rec., p. 62; Finding VI, Rec., p. 63; Opinion, Rec., p. 65, 2nd par.)

The Court of Claims has found that the fair and reasonable value of the service sued for was \$52,327.60.

It is respectfully submitted that, upon these facts, a right of action for \$52,327.60 against the defendants became vested in William Weighel and, since his decease, is now vested in his personal representative (claimant), and that, upon the facts found by the Court of Claims, judgment should be entered in favor of the claimant against the defendants for the sum of \$52,327.60

THE APPELLANT BELIEVES THAT THE ARGUMENTS HEREINBEFORE SUBMITTED SUFFICIENTLY ESTABLISH HIS RIGHT OF ACTION AND RIGHT TO JUDGMENT. IN THE REMAINING PORTION OF THE BRIEF, HOWEVER, THOSE ARGUMENTS WILL BE AMPLIFIED TO THE EXTENT NECESSARY TO ANSWER POSSIBLE ARGUMENTS OF THE DEFENDANTS, AND CERTAIN ASPECTS OF THE OPINION OF THE LOWER COURT WILL BE DISCUSSED.

II.

THE SERVICE SUED FOR WAS NOT COVERED
BY THE CONTRACT.

(a) The Service Was Expressly Excluded by the Representations of the Defendants.

The contract entered into between Weighel and the defendants under which the defendants claimed the extra service was required, provided, in the second paragraph, as follows:

"Witnesseth, That whereas W. Weighel has been accepted as contractor for transporting the mails on Route No. 235001 * * *, under an advertisement issued by the Postmaster-General on the 15th day of September, 1894, for such service, which advertisement is hereby referred to, and made by such reference a part of this contract."
* * * (Rec., p. 55).

This contract was entered into pursuant to a proposal which contained the following language:

"This proposal is made after due inquiry into, and with full knowledge of, all particulars in reference to the service; and, also, after careful examination of the conditions attached to the advertisement, and with the intent to be governed thereby." (Rec., p. 49.)

The advertisement (Rec., p. 39, *et seq.*) referred to in the proposal and made by the contract a part thereof, contains the following:

"1. The foregoing schedules show the service, August 15, 1894, as near as can be stated. Bidders must inform themselves of the amount and

character of the service that will be required during the next contract term."

"27. Bidders are requested to use the blanks for proposals furnished by the Department, which may be obtained at the post-office on each route herein advertised. For information relative to the service and its requirements, bidders are requested to apply to the Postmaster at the city where the service is to be performed."

It should be noted that the proposal used by the bidder is prescribed as to form and contents by the defendants.

The Court of Claims has made the following Finding of Fact:

"II. At the time the plaintiff's decedent bid on this route no mail service in the city of Chicago was being performed to and from the street cars by contractors who were performing the same mail service which was bid for by the plaintiff's decedent, nor did the proposal of the defendants for mail service on this route mention service to and from street cars, although the proposal to bidders published by the defendants for the period beginning July 1, 1899, did mention specifically electric and cable cars. The plaintiff's decedent, through his agent, was informed by the postmaster at Chicago, who was authorized by the Postmaster General of the United States to give information to bidders, that the bidder obtaining the contract for the performance of mail service on route 235001 for the period set out in Finding I would not be required to perform mail service to and from street cars" (Rec., p. 62).

Weighel's action was taken under the instructions of the defendants in the advertisement issued by them

and the information so secured from the defendants was, under the terms of the contract entered into between Weighel and the defendants, made a part of such contract.

The direction by the defendants to bidders to apply to the Postmaster at Chicago for information relative to the route and the supplying of information to Weighel places the claimant in the same position as was the claimant in the case of

Hollerbach vs. United States, supra.

In that case specifications were furnished to the claimant showing the quantity of work that would be required under the contract, and later it was found that the work required under the contract was much greater than stated in the specifications shown to claimant. This Court held that such specifications were a part of the contract and that the claimant could recover for the extra work done, the defendants having represented that the work contracted for was that described in the specifications. In the present case Weighel was furnished by the Postmaster at Chicago with specifications (verbal) showing the quantity of work that would be required under his contract and expressly limiting the work that would be required. After the execution of the contract, work which the Postmaster at Chicago had expressly stated would not be included within the work required under the contract, was demanded of Weighel, and was furnished by him under protest.

The parallel between the two cases is exact, and the same parallel exists between the present case and the case of

Christie vs. United States, supra,

where the Court held, on page 242, as follows:

"It makes no difference to the legal aspects of the case that the omissions from the records of the results of the borings did not have sinister purpose. There were representations made which were relied upon by claimants, and properly relied upon by them, as they were positive."

See also *United States vs. Spearin, supra*;
United States vs. Atlantic Dredging Co., supra.

In the *Utah, Nevada & California Stage Co.* case, which involved a form of advertisement for mail service apparently identical with the one in this case (see Rec., p. 38 *et seq.*), the representation by the defendants, upon which this Court allowed a recovery, was that there were two elevated stations to be served, while as a matter of fact there were four, and this Court said:

"* * * It is true that the advertisement required the bidders to inform themselves as to the facts, and stated that additional compensation would not be allowed for mistakes; but, in the present instance, the government, in its advertisement, had positively stated the number of stations at two. The contractor had a right to presume that the government knew how many stations were to be served; it was a fact peculiarly within the knowledge of the government agents, and upon which, in the advertisement, it spoke with certainty. We do not think, when the statement was thus unequivocal, and the document was prepared for the guidance of bidders for government service, that the general statement that the contractor must investigate for himself, and of

nonresponsibility for mistakes, would require an independent investigation of a fact which the government had left in no doubt. We think the court of claims correctly allowed this item" (199 U. S., 414, 424, 425).

In the case at bar, the representation was even stronger for, in addition to its being upon a subject "peculiarly within the knowledge of the government agents," it was a "positive" and "unequivocal" statement that the service would not be required.

All of these cases and the case now under discussion differ from the case of

Simpson vs. United States, 172 U. S., 372,

in that in the Simpson case all previous negotiations of the parties were merged in the final contract executed between Simpson and the United States, whereas in the case above cited and the present case the contracts entered into between the claimants and the defendants made the advertisements and specifications of the defendants part of the contract.

It must therefore be apparent that, in the case at bar, the service required of claimant's decedent and here sued for was expressly excluded from the obligation assumed by him under his contract with the defendants.

(b) *The Great Burdens and Duplication of Service, with the Large Increase in Expense, Imposed Upon the Contractor, which Could Not Be Foreseen by Him, Excluded the Service from the Contract Obligation Assumed by Claimant's Decedent, under the Doctrine of the Utah, Nevada & California Stage Co. Case.*

In its Findings of Fact the Court of Claims has found that

“* * * As a result of these orders the subcontractor had to make to and from street cars 523,276 trips. * * * The service required by the aforesaid orders entailed 25,550 days' work for one man; and after the service required by said orders began the subcontractor was obliged to employ 24 men, 4 double vans, and 7 single wagons to perform the service, which had been previously performed by 4 drivers and 4 single wagons” (Finding IV, Rec., p. 63).

In its opinion the Court of Claims states (Rec., p. 65):

“* * * The Government contends that the Postmaster General under the authority conferred upon him by the contractor in this case had a right to require the contractor to render new or additional mail messenger or transfer service and that the trips to and from street cars was such new and additional service (as) was provided for in the contract. We do not think so. The service required was of an entirely different nature from that described in the contract, imposed upon the contractor very great burdens, and involved him in great expense which he could not have foreseen or guarded against when he entered into the contract.

“We think this case is governed by the principles laid down by the Supreme Court of the United States in the case of *United States vs. Stage Company*, 199 U. S., 414, 422, 423, * * *”

That case is too well known to this Court and has been too widely cited with approval in other cases to require discussion.

The above facts are believed to establish conclusively a situation to which the doctrine of the *Utah, Nevada & California Stage Co.* case is peculiarly ap-

plicable and to justify the holding of the Court of Claims that the service demanded of the contractor in this case and here sued for was not properly required under his contract.

(c) *Slavens and Proffit Cases Not Applicable.*

The defendants in the court below claimed that this case is controlled by the *Slavens* case (38 Ct. cl. 576; 196 U. S., 229) and the *Proffit* case (42 Ct. cl. 248). Such a contention is sufficiently answered by the following statement showing some of the distinctions between those cases and the case at bar:

The Proffit and Slavens Cases

(a) In the Proffit case, the advertisement specified street car service.

(b) In the Slavens and Proffit cases, there was no representation to bidders that the contract would not cover such service.

(c) In the Slavens case, there was no abnormal increase in the expense of performing the service, but on the contrary there was such an enormous reduction in expense that the defendants took advantage of the provision of the contract enabling them to discontinue it.

This Case

(a) In this case, the advertisement did not mention street car service.

(b) In this case, the defendants expressly represented to bidders that the service sued for would not be required under the contract.

(c) In this case, the service occasioned a great increase of expense due to the necessity of employing, for approximately $3\frac{1}{2}$ years, 24 men and 4 double vans and 7 single wagons to perform service that had previously been performed by 4 drivers and 4 single wagons.

(d) In neither the Slavens nor the Proffit cases was there an abnormal duplication of service. In the Slavens case, the service sued for was merely substituted for service previously performed under the contract.

(e) In the Slavens case, the defendants discontinued the contract with the payment of one month's extra pay and readvertised, thus showing that the change in the method of performing the service had resulted in a substantial saving and that the defendants expected through a new contract to benefit thereby.

(f) In the Proffit case, the contractor sued largely for the loss of profit occasioned by the discontinuance, thus conclusively showing that the service sued for caused him no loss.

(d) In this case, there was an abnormal duplication of service, the service to and from street cars being in addition to the wagon service previously and thereafter performed under the contract.

(e) In this case, the defendants did not discontinue the contract and re-advertise as they did in the Slavens case and as they surely would have done if the new method of performing the service had effected a saving.

(f) In this case, the suit is for the value of the service rendered which the Court of Claims has found to be \$52,327.60.

It thus conclusively appears that on the facts, the opinions in the Slavens and the Proffit cases are not applicable.

III.

TRAVIS ACQUIRED NO RIGHT OF ACTION
AGAINST THE DEFENDANTS FOR COM-
PENSATION FOR SERVICE RENDERED.

The lower court in its finding of law determined that the right of action vested in Travis without specifically showing the basis for its finding. Travis could have acquired rights against the defendants only in the following ways:

1. *By express contract with the defendants.* The defendants do not claim, and there is no finding of fact that supports a claim that an express contract was entered into between Travis and the defendants for any service whatever.

2. *Under certain circumstances which would imply a contract between Travis and the defendants.* The defendants had the right to select the person who should perform the service and to whom they would be liable for compensation, if any were due.

Arkansas Smelting Co. vs. Belden Mining Co.,
127 U. S., 379, 387.

This right they exercised by requesting Weighel to perform the service. This is one of those cases where the defendants would have required the service to be performed by Weighel and by no one else, and is not one of those cases where the performance of the service was of main importance and the person who performed it was of minor importance. A contract existed between Weighel and the defendants at the time the defendants requested such service, and the defend-

ants claims that such service was covered by the contract. The request for such service contained the following:

“Require contractor to perform service as follows (or more frequently, if necessary) without additional pay, in accordance with the terms of the contract.” (Finding IV, Rec., p. 63; Rec., pp. 43, 46, 47.) (After the above there followed a statement of the service required.)

Under these facts the defendants would have requested the performance of the service from no other person than Weighel and would have accepted such service from no one but Weighel or those representing him. It is a *sine qua non* in all actions to recover for services upon implied contract that the person rendering them must have intended at the time of performance that the person charged would make compensation therefor.

Elliott on Contracts, Vol. 2, p. 609, Sec. 1365.

Coleman v. United States, 152 U. S., 96.

That Travis at no time intended to hold the defendants liable for services rendered by him is apparent from the notice served by him upon the defendants, which, in effect, stated that he desired no recognition as subcontractor and that he expected to receive from them no compensation for his services, but would look to Weighel, the contractor, for compensation (Finding VI, Rec., p. 63), and by the further fact that he made no claim against the defendants for such services for a period of more than six years after the rendition of the last of such services, although during this time Weighel had instituted suit against the defendants for compensation for such services.

Inasmuch as neither the defendants nor Travis at the time of the rendition of the service expected or intended to enter into contract relations with each other regarding them, but on the contrary, each expected to enter into contract relations with Weighel regarding such service, it follows that Travis acquired no rights against the defendants.

Harley vs. United States, 198 U. S., 229.

3. *By novation.* The facts in this case do not show a novation, because the contract between Weighel and the defendants was never cancelled and his bond remained in full force during the term of the contract. The Court of Claims states (Finding I, Rec., p. 62) that the subcontract relieved Weighel of "the labor and responsibility of his contract," thus showing novation. It is apparent that the lower court inadvertently used the word "responsibility." The defendants have by statute expressly provided the only manner in which Weighel could have been released from his responsibility by entering into a subcontract, which is the only fact upon which novation could be based in this case. The statute reads in part as follows:

"* * * Whenever any contractor or subcontractor shall sublet his contract for the transportation of the mail on any route for a less sum than that for which he contracted to perform the service, the Postmaster General *may*, whenever he shall deem it for the good of the service, *declare the original contract at an end, and enter into a contract with the last subcontractor*, without advertising, to perform the service on the terms at which the last subcontractor agreed with the original contractor or former subcontractor to perform the same: *Provided, That such last subcontractor*

shall enter into a good and sufficient bond and that the original contractor shall not be released from his contract until a good and sufficient bond has been made by such last subcontractor and accepted by the Post Office Department."

(Act May 4, 1882, Sec. 1, 22 Stat. L. 53; italics ours.)

But there is not a single fact in the Findings showing, and it is not claimed by the defendants that Travis ever did file a bond in favor of the United States, or enter into such a contract with the United States, or that the Postmaster General ever declared the original contract between Weighel and the United States at an end, or that Weighel ever was released from his liability to the United States. That Weighel at all times remained liable under his contract with the United States is still further shown by the following quotation from Sec. 792 of the Postal Laws and Regulations of the year 1893, which were in effect during the term of Weighel's contract:

"Neither the permission to sublet, nor the recognition of the subcontract made in pursuance thereof, shall be construed as releasing the contractor from any of the obligations of his contract with the United States."

It is apparent that the lower court erred in its conclusion that the execution of the subcontract released Weighel from his responsibility to the defendants or in any wise constituted or effected a novation between Weighel and the defendants and Travis.

4. *By assignment to Travis from Weighel.* Sec. 3963 of the Revised Statutes of the United States prohibits

the assignment of mail transportation contracts and makes such assignments null and void. Sec. 3477 of the Revised Statutes prohibits the assignment of any claim against the United States prior to the issuing of a warrant for the sum covered by such claim. It therefore follows that Travis could have acquired no rights by assignment from Weighel either prior to the rendition of service or subsequently thereto.

5. *By a compliance with Sec. 1, 22 Stat. L. 53.* A compliance with this statute required that the subcontractor file with the Second Assistant Postmaster General a copy of the subcontract. This Travis has not done, and hence he acquired no right under this statute. See Appendix, p. 30.

6. *By a compliance with Sec. 3, 20 Stat. L. 62.* Under this statute Travis, by filing his subcontract with the Second Assistant Postmaster General, would have received from the defendants his proportion of any pay due the contractor, in accordance with the terms of his subcontract. A copy of the subcontract was not filed with the Second Assistant Postmaster General, and hence Travis acquired no rights under this statute. See Appendix, p. 30.

The facts as found show that the relation of contractor and subcontractor existed between Weighel and Travis during the performance of the service in controversy and that the lower court based its conclusion that the subcontractor Travis had a right of action against the defendants partly upon the fact that the officials of the Post Office Department had recognized Travis as subcontractor (Finding VI, Rec., p. 63).

It is a fundamental principle of public law clearly

recognized by a long series of decisions of this Court that no suit can be maintained against the United States in any Court without express authority of Congress.

Stanley vs. Schwalby, 162 U. S., 255, 269, 270.

The United States has prescribed the conditions upon which a subcontractor can acquire rights against them for services rendered under a subcontract. These conditions having been prescribed by statute, it is incumbent upon the subcontractor to comply with them in order that he may bring suit against the United States. In the present case the subcontractor did not comply with the statutes under which he might have instituted suit and hence has no standing in Court whatever. Where the United States has prescribed the taking of certain steps in order that suit may be instituted against them, this Court has many times held that a failure to follow the statutory requirements, although such requirements are purely formal, deprives the person so failing to comply, of the right of action he otherwise would have. The last expression of this Court on this subject is as follows:

“Men must turn square corners when they deal with the Government. If it attaches purely formal conditions to its consent to be sued, those conditions must be complied with.”

Rock Island, Arkansas & Louisiana R. R. Co. vs. The United States. Adv. Ops. Oct. term, 1920, pp. 66, 67.

The lower Court found that the Post Office Department recognized the subcontractor as a subcontractor, and at the same time found that the subcontract was

not filed as required by Section 3, 20 Stat. L., 62. From the first finding the lower Court apparently concluded that the officials of the Post Office Department could, by recognizing a subcontractor, confer upon him the right to sue the United States for his pay, although the statute requiring the filing of the subcontract had not been complied with.

“Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States or their property to the jurisdiction of the Court in a suit brought against their officers.”

Stanley vs. Schwalby, supra,

Case vs. Terrell, 78 U. S., 199, 202,

Carr vs. The United States, 98 U. S., 433, 438,

United States vs. Lee, 106 U. S., 196, 205.

If neither the Secretary of War nor the Attorney General nor their subordinates could waive statutory provisions relative to suits against the United States, then neither the Postmaster General nor his subordinates could, by recognizing a subcontractor, relieve him of the necessity of complying with the statutory requirement that he file his subcontract with the Second Assistant Postmaster General before he can acquire rights against defendants.

Whatever may be the sense in which the word “recognized” may be used by the Post Office Department, it is clear that in this case it can have no legal significance and can have been used by the lower Court (Finding VI, Rec., p. 63), only in the sense of “acknowledged as subcontractor” and, therefore, “per-

mitted" by the Department to perform the service, but it could not have been used in the sense that any rights were thereby acquired by the subcontractor which could in any way affect the contractor's right to be paid for the service here performed.

IV.

THE PETITION FILED IN THE COURT OF CLAIMS BY THE SUBCONTRACTOR HAS NO BEARING HEREIN.

The petition of Travis to be substituted for Weighel as claimant herein, which was filed August 6, 1907, in no wise added to or changed the facts or in any way affected, or could affect, the rights of Weighel, or his personal representative against the defendants. The question being considered is the rights of Weighel against the defendants, not those of Travis. Weighel's petition was timely filed in the Court of Claims and his right to recover, under this petition, cannot be minimized or destroyed by the subsequently filing of a similar petition by Travis.

V.

WEIGHEL AND HIS REPRESENTATIVE, SINCE THE PERFORMANCE OF THE SERVICE, HAVE CONTINUOUSLY ASSERTED WEIGH- EL'S RIGHT TO COMPENSATION.

The statement in the Finding of Law in the lower Court that neither Weighel nor his representative has claimed that Weighel performed the extra service, is inaccurate. His protest against the performance

and his notice that compensation would be demanded therefor (Finding IV, Rec., p. 63), and the claim made in paragraph 12 of his petition in the Court of Claims (Rec., p. 5), and the corresponding claim in paragraph XII of the petition of his personal representative (Rec., p. 37), clearly demonstrated that Weighel at the time of the performance of the service, and thereafter, continuously, to the time of his death, claimed that he performed the extra service and was entitled to compensation therefor, and that his personal representative is now making the same claim.

VI.

THE OPINION OF THE LOWER COURT.

The error of the lower Court arose:

1. Because it was assumed that the officers of the defendants, in this case the Post Office Department, could by recognizing Travis as a subcontractor under Weighel, the principal contractor, thereby confer upon Travis' rights against the United States. The statutes provided the method by which Travis could secure rights under his subcontract which would be recognized by the defendants, and no other method could be followed which would confer rights upon him.

2. Because it assumed that the defendants became liable to Travis for the extra service, because the service was performed by him, or those employed by him, and not by Weighel, and overlooked the fact that Travis was employed by Weighel to perform all service demanded by the Post Office Department in connection with the contract, and hence the service was in

fact performed by Weighel and the defendants became indebted to him therefor.

3. Because it assumed that inasmuch as Travis incurred the expense of the extra service performed under his contract with Weighel, that, therefore, Travis had a right of action against the defendants who received the benefit of the service under their contract with Weighel, and that Weighel had no interest in the subject-matter of the suit, overlooking the fact that Weighel was responsible to Travis for compensation for the extra service rendered by Travis to Weighel under his contract with Weighel. That Travis expects in turn to be paid by the estate of William Weighel is beyond question, but this expectation on his part does not give him a suable interest in debts due the estate. The fallacy of the reasoning is apparent, not only from the cases heretofore cited, but also because under it, Sec. 3, 20 Stat. L., 62, would be nullified and a subcontractor could make a claim against the Government without complying with its terms.

CONCLUSION.

The facts found show: (1) A contract between Weighel and the defendants; (2) a subcontract between Weighel and Travis; (3) a non-filing of the subcontract with the Post Office Department as provided by statute; (4) extra service rendered upon request made therefor by the defendants upon Weighel; (5) a protest by Weighel against the performance of such service as not coming within the terms of the contract between him and the defendants, and notice that extra compensation would be demanded therefor; (6) a clear

representation by defendants prior to the execution of the contract that the service sued for would not be required under the terms of the contract; (7) the actual performance of such service by Weighel through his subcontractor; (8) nonpayment of compensation by defendants for the performance of such service.

Under these facts the right of action was in Weighel, and is now in claimant, and Travis had no interest therein as against defendants. The suit was properly instituted in the name of Weighel, and upon his death his personal representative was properly substituted. A suit in the name of Weighel for the benefit of Travis would have been improper, and, moreover, if the suit could have been maintained in the name of Weighel for the benefit of Travis, it could, under the common law, and under a great majority of the codes, have been maintained in the name of Weighel alone. (See 30 Cyc., 77, 78 and cases cited.)

The rights of a party having an interest in the subject-matter of litigation, arising out of contract relations existing between him and the plaintiff, is discussed in the case of *Cole vs. Ralph*, 252 U. S., 286, 291, 292. In that case one Forman had an interest in the claim in litigation, under a contract between him and the plaintiffs. The claim arose out of conflicting mining locations, and he had not joined in filing the adverse claim, or in bringing the suit. The lower Court, upon motion, admitted him as a party plaintiff. This Court held:

“We think his interest was not such as to make him an essential party to the adverse claim, or to the suit, and yet was such as to make him an admissible party to either.” (252 U. S. 291, 292).

If Forman, who had a contract giving him "a real interest" in the above suit was not a necessary party to that suit, it is difficult to see in what way Travis, under his contract with Weighel, would be a necessary party in the present suit.

The judgment of the lower Court should be reversed.

Respectfully submitted,

A. R. SERVEN,
BURT E. BARLOW,
A. C. TRAVIS.

APPENDIX:

SUE-LETTING MAIL TRANSPORTATION CONTRACTS.

"Sec. 2. Hereafter no sub-letting or transfer of any mail contracts shall be permitted without the consent in writing of the Postmaster General; and whenever it shall come to the knowledge of the Postmaster General that any contractor has sub-let or transferred his contract, except with the consent of the Postmaster General as aforesaid, the same shall be considered as violated and the service may be again advertised as herein provided for; and the contractor and his securities shall be liable on their bond to the United States for any damage resulting to the United States in the premises." (20 Stat. L., 62.)

RIGHT OF SUBCONTRACTOR UPON FILING SUBCONTRACT.

"Sec. 3. Hereafter, when any person or persons being under contract with the Government of the United States for carrying the mails, shall lawfully sub-let any such contract, or lawfully employ any other person or persons to perform the service by such contractor as agreed to be performed, or any part thereof, he or they shall file in the office of the Second Assistant Postmaster General a copy of his or their contract and thereupon it shall be the duty of the Second Assistant Postmaster General to notify the Auditor of the Treasury for the Post Office Department of the fact of the filing in his office of such contract. Said notice shall embrace the name or names of the original contractor or contractors, the number of the route or routes, the name or names of the subcontractor or subcontractors, and the amount agreed to be paid to the subcontractor

or subcontractors. And upon the receipt of said notice by the Auditor of the Treasury for the Post Office Department, it shall be his duty to retain, out of the amount due the original contractor or contractors the amount stated in said notice as agreed to be paid to the subcontractor or subcontractors, and shall pay said amount, upon the certificate of the Second Assistant Postmaster General, to the subcontractor or subcontractors, under the same rules and regulations now governing the payments made to the original contractors: PROVIDED, That upon satisfactory evidence that the original contractor or contractors have paid off and discharged the amount due under his or their contract to the subcontractor or subcontractors, it shall be the duty of the Second Assistant Postmaster General to certify such fact to the Auditor of the Treasury for the Post Office Department; and thereupon said Auditor shall settle with the original contractor or contractors, under the same rules as are now provided by law for such settlements." (20 Stat. L., 62).

PROVISIONS AS TO SUB-LETTING CONTRACTS AND RIGHTS
OF SUBCONTRACTORS UNDER CHAP. 116, OF 22 STAT.
L., 53.

"That whenever any contractor or subcontractor shall sub-let his contract for the transportation of the mail on any route for a less sum than that for which he contracted to perform the service, the Postmaster General may, whenever he shall deem it for the good of the service, declare the original contract at an end, and enter into a contract with the last subcontractor, without advertising, to perform the service on the terms at which the last subcontractor agreed with the

original contractor or former subcontractor to perform the same: *Provided*, That such last subcontractor shall enter into a good and sufficient bond and that the original contractor shall not be released from his contract until a good and sufficient bond has been made by such last subcontractor and accepted by the Post Office Department: *Provided, further*, That when a contract hereafter made is declared void on account of its having been sub-let, the contractor shall not be entitled to one month's extra pay as provided for by law: *And provided further*, That if any person shall hereafter perform any service for any contractor or subcontractor in carrying the mail, he shall, upon filing in the department his contract for such service, and satisfactory evidence of its performance thereafter, have a lien on any money due such contractor or subcontractor for such service to the amount of the same; and if such contractor or subcontractor shall fail to pay the party or parties who have performed service as aforesaid the amount due for such service within two months after the expiration of the quarter in which such service shall have been performed, the Postmaster General may cause the amount to be paid said party or parties and charge to the contractor, provided that such payment shall not in any case exceed the rate of pay per annum of the contractor or subcontractor: *And provided further*, That where any person, corporation, or partnership shall have contracts for the performance of mail service upon more than one route, and any failure to perform the service according to contract on any one or more of such routes shall occur, no payment shall be made for service on any of the routes under contract with such person, corporation,

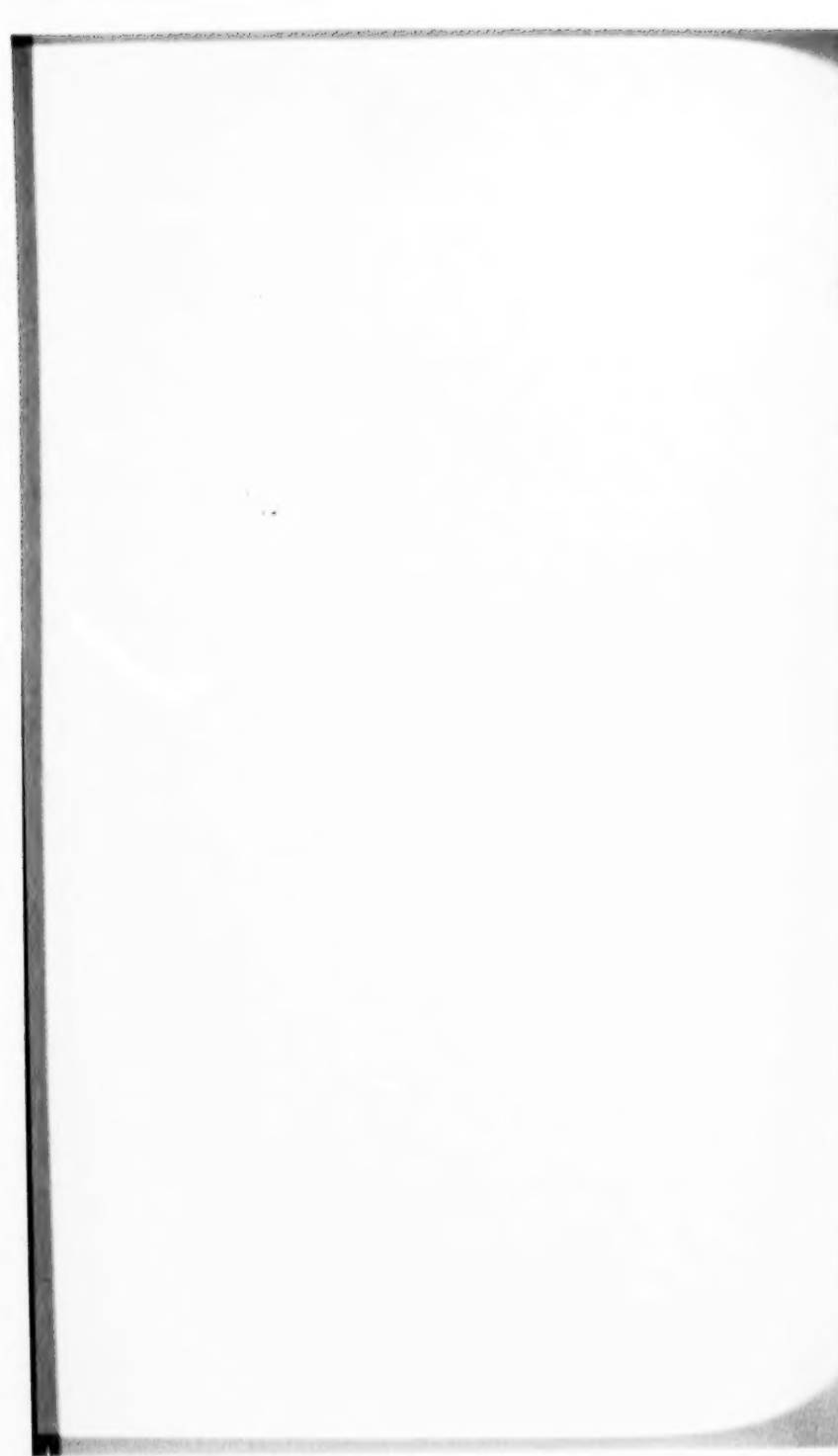
or partnership until such failure has been removed and all penalties therefor fully satisfied."

MAIL CONTRACTS NOT ASSIGNABLE.

"Sec. 3963. No contractor for transporting the mail within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void."
(R. S.)

ASSIGNMENTS OF CLAIMS WHEN VOID.

"Sec. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."
(R. S.)



CONTENTS.

	Page.
Statement.....	1
Proceedings.....	5
Argument.....	6
I. The right of action, if any existed, was not in Weighel.....	6
II. The service required was provided for by the contract.....	14
A. The terms of the contract and advertisement clearly cover the service required as new or additional or changed service and which the contractor was obliged to perform without additional compensation.....	16
B. The statement of the postmaster at Chicago was not a warranty that the service would not be required.....	28
C. The increased expense of service did not give the claimant a right of action.....	31
Conclusion.....	33
Cases cited:	
<i>Christie v. United States</i> , 233 U. S. 165.....	31
<i>Hollerbach v. The United States</i> , 233 U. S. 165.....	31
<i>Proffit v. The United States</i> , 42 Ct. Cls. 248.....	21
<i>Slavens v. The United States</i> , 38 Ct. Cls. 574; 196 U. S. 229.....	21, 22
<i>Tyler v. Judges, &c.</i> , 179 U. S. 405.....	13
<i>Union Transfer Company case</i> , 36 Ct. Cls. 216.....	23, 32
<i>United States v. Atlantic Dredging Co.</i> , 253 U. S. 1.....	31
<i>United States v. Spearin</i> , 248 U. S. 132.....	31
<i>Utah-Nevada-California Co. case</i> , 39 Ct. Cls. 435; 199 U. S. 414..	23, 32



In the Supreme Court of the United States

OCTOBER TERM, 1920.

CHARLES F. HUNT, EXECUTOR OF THE
Estate of William Weighel, De-
ceased, appellant,
v.

THE UNITED STATES.

} No. 313.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES

STATEMENT.

This case comes on appeal by Hunt, executor of the estate of William Weighel, deceased, from the judgment of the Court of Claims dismissing his petition on the ground that Weighel had no interest in the subject matter of the suit and therefore his executor can not maintain it.

On September 15, 1894, the Postmaster General issued an advertisement inviting proposals for the carriage of the mails in covered regulation wagons for the term from July 1, 1895, to June 30, 1899, in Chicago, Illinois, among other cities. (R. pp. 6, 38; Finding of Fact I, R. p. 61.) The advertisement provided for the performance of mail messenger, transfer, and mail station service between the post

offices and railroad stations, between the post offices and steamboat landings, between the post offices and mail stations, and between the several railroad stations, steamboat landings, and mail stations; or between the several railroad stations, steamboat landings, and mail stations then established or that might thereafter be established, whether caused by the establishment of new or by change of site of existing post offices, railroad stations, steamboat landings, or mail stations within said city, or caused by the alteration of the routes made necessary for any other reason. (R. pp. 7, 39.) Attached to said instructions to bidders was a schedule setting forth the existing mail messenger service, transfer service, and mail station service, and probable and additional service. (R. p. 39.) Said schedule included service between the general post office and mail stations, among other services. (R. p. 126.) While a statement of probable additional service was included it was said that it would not limit the liability of the contractor to perform all service that might be necessary, without additional pay. (R. p. 39.)

William Weighel submitted a proposal for the performance of the service in Chicago in accordance with the advertisement for the sum of \$72,400 per annum, which proposal was accepted by the Postmaster General and on January 17, 1895, Weighel and the defendants entered into a contract in writing for the performance of said service. (Finding I, R. pp. 61, 62; contract, R. pp. 55, et. seq.) By the terms of said contract the provisions of the ad-

vertisement and instructions to bidders were made a part thereof and the bidder contracted to carry all the mails in accordance therewith, and to perform all new or additional or changed mail messenger, transfer, and mail station service that the Postmaster General might order during the contract term, without additional compensation, whether caused by a change of location of post office, stations, landing, or the establishment of others than those existing at the date thereof, or rendered necessary in the judgment of the Postmaster General for any cause. It was further agreed thereby that the Postmaster General might change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon without change of pay. (R. pp. 57, 58.)

On February 6, 1895, before the beginning of the contract term, Weighel, the contractor, entered into a subcontract with Ezra J. Travis by which Travis agreed for the sum of \$70,000 per annum to carry the mails on the route in question, relieving Weighel of the labor of his contract. Travis bound himself in the sum of \$100,000 to Weighel to assume all liability for fines and deductions which might be imposed against Weighel. (Finding I, R. pp. 61, 62; subcontract, R. pp. 23, et. seq.)

Weighel had the permission of the Postmaster General to enter into the subcontract and Travis was recognized by the Post Office Department as subcontractor, but no copy of the subcontract was filed with the Postmaster General under the provision

of law giving the subcontractor a lien upon the pay of the contractor by so doing, and they notified the Postmaster General that the subcontract was not intended to be filed as a lien against such pay. The department, however, recognized the subcontractor in the actual conduct of the service. (Finding VI, R. p. 63, R. p. 19.)

After the beginning of the service mails were authorized to be transported on certain electric lines in the city of Chicago and orders were issued requiring the contractor for the wagon service to perform service between such lines and certain contiguous postal stations named in the advertisement. (Finding IV, R. p. 63; R. pp. 43-47, incl.) Requests were made upon the contractor, Weighel, and the subcontractor, Travis, to perform this service. (R. pp. 43, et seq.) Both Weighel, contractor, and Travis, subcontractor, protested by letter of September 1, 1896, to the Second Assistant Postmaster General, requesting pay for the service performed and requesting that provision be made for payment for future service. (R. p. 20.)

The subcontractor, Travis, performed the service described in the advertisement and contract, which is not in dispute here, and has received full payment therefor. (Finding III, p. 62.) He also performed all the service required by the orders in question, payment for which this suit was brought, and paid all the expense thereof, and has not been paid additionally therefor. (Finding of Fact IV, R. p. 63, Op. R. pp. 65, 66.)

PROCEEDINGS.

On April 18, 1901, the original petition was filed, purporting to be that of Weighel, claiming pay for the service covered by the orders in question. (R. p. 1.) No further steps were taken so far as the records show until August 6, 1907, when permission of court was obtained by claimant's attorney to file an amended petition in the name of Travis, which petition was filed.

Thereafter on February 13, 1912, claimant was granted leave of court to withdraw the amended petition and to file an amended substitute petition. This substituted petition for the amended petition filed August 6, 1907, was filed in the name of Travis, claimant, February 13, 1912. (R. pp. 13, 14.)

The defendants demurred to both the original petition and the substitute to the amended petition, and the Court of Claims sustained the demurrer to the Travis petition because of the statute of limitations and overruled it as to the original or Weighel petition. (R. pp. 29 et seq.) No appeal was taken from the judgment of the court dismissing the Travis petition.

Thereafter, on June 11, 1918, the appellant herein, Hunt, executor of the estate of Weighel, deceased, substituted claimant, filed an amended petition (R. pp. 32 et seq.), setting forth the same cause of action theretofore presented in the original petition. The Court of Claims decided, however, that such cause of action as arose was in Travis, whose petition

had been dismissed because of the statute of limitations, and not in Weighel, and therefore gave judgment that Weighel's executor, the appellant herein, is not entitled to recover and that his petition be dismissed. It is from this judgment dismissing Hunt's petition that the appeal to this court is prosecuted.

ARGUMENT.

I.

The right of action, if any existed, was not in Weighel.

Ordinarily performance by the subcontractor is performance by the contractor so far as the other party to the contract is concerned. The subcontractor is not a party to the prime contract, suit upon which must be brought by the contractor party to it, and his liability to or settlement with the subcontractor is no concern of the defendant, because the suit is not brought for the benefit of the subcontractor. When necessary the liability to the subcontractor can be set up in determining the amount due, but it is set up not for the benefit of the subcontractor, but as showing part of the cost of performance by or damage on account of breach to the contractor. The question in cases of this class is, was the service called for by the contract performed, or was the contractor ready, able, and willing to perform it, not what subcontractors had performed or would have performed it.

But in this case no such situation exists. Travis had an interest in Weighel's contract with the Government; except for the fact that payments were made to Weighel, Travis was treated as contractor by the Government. Weighel had a contract with the Government and also a contract with Travis. The contract with Travis was fully performed and Travis had no claim against Weighel under it. This appears negatively, also positively by the fact that Travis paid to Weighel the difference between the Government contract and the subcontract, \$2,400 per year (Finding I, Rec. 62). Weighel's contract with the Government was fully performed; he not only asserted no claim against the Government but refused to do so.

The real situation existing at the date of the completion of Weighel's contract with the Government (June 30, 1899, Finding I, Rec. 61) and prior to the filing of the petition signed for Weighel (Apr. 18, 1901) is shown by the following extracts from and exhibits attached to the substituted petition filed and verified by Travis on February 13, 1912 (Rec. 14, 22):

That the payments for the service for so transporting the mails on said route 235001 for the said term were duly made by the United States to said William Weighel. That said Weighel paid to said Travis for said services the said annual sum of \$70,000 as provided in said subcontract, and therefor paid him nothing more, and declined to bear any of the responsibility or expenses of any

of the said services set forth in the said petition; said Weighel further declined to have suit brought in his name for the alleged extra services as set forth, except upon the express condition that "any such suit or suits to be instituted at the sole cost, charge and expense of the said Travis—and not otherwise." This authority, with the condition here stated, is in writing, duly acknowledged before a notary public, and a copy, as Exhibit 2, is attached hereto as a part of this substitute for the amended petition. The limitation of such authority is sought to be added to by the attorney of said Weighel, E. B. Young, in his letter to said Travis of November 14, 1899, transmitting the said written authorization of said Weighel, as follows: "This authority is sent you upon the conditions that you agree to hold and save harmless, Mr. Weighel from all claims or demands of every kind or description that may be made by being made the plaintiff in the suit against the Government, and upon the further condition, as stated in the authority, that any such suit or suits must be at your sole cost, charge and expense." A copy of this letter is hereto attached as a part of this substitute for the amended petition. (Exhibit 3.)

That all the services alleged in the petition, to which this is an amendment, as having been extra and not provided for by the said contract between the United States and said Weighel, and not paid for by the United States, were performed by said Ezra J. Travis,

your petitioner herein, and by no other person, and that all the expenditure and cost made necessary by performing said alleged extra services, were duly and wholly borne by said Travis.

* * * * *

Exhibit 2 (p. 27).

Know all men by these presents, that W. Weighel, of the city and county of San Francisco, contractor on mail messenger, transfer, and mail station route number 235001, city of Chicago, and the performance of which service was sublet by the said W. Weighel to E. J. Travis for the period from July 1, 1895, to June 30, 1899, does hereby authorize and empower the said E. J. Travis to bring suit against the United States Government for the recovery of any money or moneys due for any service performed that is not embraced in the contract made between the said Weighel and the said United States Government for the said service during the said period of time, any such suit or suits to be instituted at the sole cost, charge and expense of the said Travis and not otherwise.

As witness my hand and seal this 14th day of November, 1899.

(Signed)

W. WEIGHEL.

* * * * *

Exhibit 3 (p. 28).

GORDON & YOUNG,
ATTORNEYS AND COUNSELLORS AT LAW,
14 SANSOME STREET,
San Francisco, Cal.

Rooms 6, 7, 8, and 9. Telephone 5098.

NOVEMBER 14, 1899.

E. J. TRAVIS, Esq.,

525 East 15th Street, New York City.

DEAR SIR: Enclosed please find authority from Mr. Weighel to bring suit for the performance of station service in connection with route number 235001 that was not a part of the contract. This authority is sent you upon the condition that you agree to hold and save harmless Mr. Weighel from all claims or demands of every kind or description that may be made by being made the plaintiff in the suit against the Government and upon the further condition as stated in the authority that any such suit or suits must be at your sole cost, charge and expense. Be good enough to acknowledge receipt of this letter and your acceptance of the conditions upon which the authority is sent. If any other authority is needed kindly advise me.

Yours very truly,
(Signed)

E. B. YOUNG.

Travis was the real party in interest so far as the extra services are concerned and should have brought suit in his own name within the statutory period. When he did file his petition it was dismissed on account of the bar of the statute of limitations, not

for want of any capacity to sue. His contract with Weighel was entered into with the knowledge and consent of the Government, and he was recognized and dealt with by the Government as subcontractor (Findings I and VI, Rec. 62, 63.) He openly declined to file his contract with the department and was not required to do so; the only effect of this was that he could not claim the lien provided by section 3 of the act of May 16, 1878, chapter 107, 20 Stat., 61, 62. This statute has no bearing whatever upon the right of Travis to sue. Section 2 of this act was complied with; the substituted petition specifically alleges (Rec. 19) that written permission of the Postmaster General was secured before the subcontract was executed; this allegation stands admitted by the demurrer. The law referred to on pages 20, 21 of appellant's brief is part of the act making appropriations for the Post Office Department for the fiscal year ending June 30, 1883 (ch. 116, act of May 4, 1882, 22 Stat., 52, 53, 54); it clearly has no application to this case, for no action was taken under it by the Postmaster General. The only law cited by appellant which is applicable was section 2 of the act of May 16, 1878, which, as shown above, was complied with; this alone would establish a relationship between Travis and the Government which would have entitled him to sue.

If it was at all possible for Travis to obtain permission or authority to bring suit in Weighel's name, the original suit was not so brought; it was signed

and verified "William Weighel by J. H. McGowan, attorney for petitioner." (Rec. 5.) This petition does not mention Travis's name or contract. Though prior to the bringing of the suit Weighel had "declined to bear any of the responsibility or expense of any of said services," and had declined to bring suit, and, in fact, all said services had been performed by Travis, this petition filed and verified in Weighel's name stated positively:

That in pursuance of said several orders and under the terms of the said several protests your petitioner performed all of said additional service and made all the additional trips hereinbefore set forth, although such services were not within the terms of his contract aforesaid, and they were fairly and reasonably worth, over and above all just credits and offsets, the sums hereinafter set forth in your petitioner's bill of particulars, hereto attached as Exhibit "F" and made a part hereof; and your petitioner avers that said claim has not been assigned or transferred by him, and that all of said service was received and accepted by the United States, and by reason thereof there arises on the part of the United States an implied promise to pay your petitioner the reasonable worth of the same.

It was not until the substituted petition was filed by Travis that the actual facts appeared which showed that Weighel, by his own admissions, had absolutely no interest in this claim, and that the only person interested was Travis. The substituted petition was probably filed because it was realized

that Weighel, as petitioner, could not recover in his own right, never having performed any of the extra service and being under no responsibility whatever to answer to Travis for the same. *Tyler v. Judges of Court of Registration*, 179 U. S. 405, 407. It being apparent that Travis was the real owner of the claim the question arises as to how he acquired it. Certainly not by assignment; if he had it would be barred by section 3477, R. S., and section 3963, R. S. If not by assignment, then on account of his interest in the Weighel contract, his right to claim through Weighel, but this is specifically negated by his own sworn statement, showing that there was absolutely no responsibility of Weighel to him on account of this extra work. Then, too, were this the case, Travis should have sued Weighel, or he should have sued in Weighel's name, so stating and showing the facts; but neither course was adopted. Instead a petition was filed by Weighel claiming as sole owner. The fact is that Travis was the real and only party in interest; that he acquired his interest, not by assignment from Weighel (Weighel never owned the claim), not under his contract with Weighel, for that was fully performed and settlement had between him and Weighel; but on account of extra services required from him by the Government, performed by him for the Government, and for which Weighel had expressly disclaimed any liability. It was therefore incumbent upon him to assert his claim by suit

within the statutory period; this he did not do and the Court of Claims rightly decided that he could not do so after that period had expired, nor can he, after the statute has run against him, prosecute an action and recover in the name of one who performed no services, has no liability on account of the same, contractual or otherwise, and who has refused to bring suit. This is what is sought to be done. After the substituted petition of Travis was dismissed on demurrer, the executor of Weighel was substituted as claimant in the original petition; thereupon an amended petition was filed by the executor, which again asserts the claim as that of Weighel and makes no mention of Travis or the Travis contract; probably because when Travis is brought into the case Weighel must go out, as there was no contractual relation between Weighel and Travis when the original petition was filed; no responsibility of Weighel to Travis; and when Travis is brought in it is conclusively shown that Weighel, or his executor, is asserting against the Government a claim in which he has no interest and on account of which he has no liability to anyone.

II.

The service required was provided for by the contract.

The Court of Claims was of opinion that the service required under the orders in question was not provided for by the contract between Weighel and the United States, but that no cause of action arose in

favor of Weighel. The Government contends that the service was in fact provided for by the contract and that, consequently, no cause of action arose in favor of either Weighel or Travis.

The form of contract entered into by Weighel with the United States for the performance of regulation screen wagon service in Chicago, Ill., and the form and character of the general terms of the advertisement under which the proposal was submitted and the contract was made (R. pp. 38-43, 55-60) are identical in every essential particular with those of the contracts and advertisements for such wagon service that have for a number of years been presented to the Court of Claims and this court in questions as to whether service as required thereunder has or has not been provided for thereby. Therefore the decisions in the cases of this character are determinative of the rights of the parties in interest in this case. Where the same character of service has been involved these decisions have generally been in favor of the Government. The real claimant in this case, Travis, seeks to avoid the terms of the contract herein and the authority of such cases by claiming a warranty on the part of the Government by reason of certain information given to the agent of Weighel by the postmaster at Chicago to the effect that the contractor under the advertisement would not be required to perform this service in question.

A.

The terms of the contract and advertisement clearly cover the service required as new or additional or changed service and which the contractor was obliged to perform without additional compensation.

The advertisement was issued inviting proposals for covered regulation mail messenger, transfer, and mail station service "for carrying the mails of the United States in the covered regulation wagons prescribed by the department, on the routes herein specified, being covered regulation wagon mail messenger, transfer, and mail station service in the cities hereinafter named, between the post offices and railroad stations, between the post offices and steamboat landings, between the post offices and mail stations, and between the several railroad stations, steamboat landings, and mail stations, as prescribed herein," etc. (R. p. 38.)

The advertisement set forth schedules for mail messenger service, transfer service, and for mail station service, and also schedules for probable additional service, all of which pages are omitted from the printed record (R. p. 39), excepting one page showing the character of service required between the general post office and mail stations (R. p. 126).

Paragraph 2 of the advertisement provided as follows:

The contractors under this advertisement will be required to perform, without additional compensation, any and all new or additional service that may be ordered from July 1, 1895,

or at any time thereafter during the contract term, whether between post offices and railroad stations, between post offices and steamboat landings, between post offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations, now established or that may hereafter be established, whether caused by the establishment of new or by change of site of existing post offices, railroad stations, steamboat landings, or mail stations within said cities, or caused by the alteration of the routes made necessary for any other reason. Bids must be made with this distinct understanding and must name the amount per annum for the whole service and not by the trip. (R. p. 39.)

The advertisement was by the terms of the contract made a part thereof.

The contract itself recited that Weighel had been accepted as contractor for transporting the mails on the route in question in Chicago, Illinois, under an advertisement issued by the Postmaster General, which advertisement was made by reference a part of the contract, and "for performing all new or additional service of said kinds which may at any time during the term of this contract be required in said city," for and during the term named therein. (R. p. 55.)

By stipulation first, of the contract, the contractor agreed to carry such mail, using therefor wagons of the kind therein described in sufficient number "to transport the whole of said mail, whatever may be its size, weight, or increase during the term of

this contract * * * ; and so to carry until said schedule is altered by the authority of the Postmaster General, as herein provided, and then to carry according to such altered schedule; to carry said mails in a safe and secure manner, free from wet or other injury, in substantial one or two horse wagons of sufficient capacity for the entire mail," etc. (R. p. 56.) The contract further provided as follows:

Second. To take the mail from, and deliver it into, the postoffices, mail stations and cars at such points, and at such hours, under the directions of the postmaster at Chicago, Ill., approved by the Postmaster General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage.

Third. To furnish the number of regulation wagons that, in the opinion of the postmaster at Chicago, Ill., will be sufficient for the prompt and proper performance of the service, including extra wagons to take the place of those that may be temporarily unserviceable, delayed waiting for trains, or withdrawn from service for repairs.

* * * * *

Tenth. To perform all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station service that the Postmaster General may order at the city of Chicago, Ill., during the contract term, without additional compensation, whether caused by change of location of

postoffice, stations, landing, or the establishment of others than those existing at the date hereof, or rendered necessary, in the judgment of the Postmaster General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster General may require, as a part of such new or additional service.

* * * * *

It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity. (R. pp. 56, 57, 58.)

At the time Weighel bid for the service the mails were not officially carried in the city of Chicago by the electric and cable cars. (Findings II, R. p. 62.)

After the service went into effect the Postmaster General authorized the carriage of mails on the street railways in Chicago and issued orders requiring the wagon contractor to perform service under his contract without additional pay in accordance with the terms of the contract between the general post office and the West Chicago Street Railway at

Chicago and Madison Streets, between the general post office and the North Chicago Street Railway at Clark and Monroe Streets, and between mail stations C, D, E, F, G, A, and B, and the contiguous points upon said West Chicago Street Railway and North Chicago Street Railway. (R. pp. 43, 44, 45.) Other orders were subsequently issued requiring like service between certain mail stations and street railways. (R. pp. 46, 47.)

The question here therefore is whether this required service was new or additional or changed service, as provided for by the terms of the advertisement and contract.

This service was "new, additional, or changed service," as provided for by paragraphs 2 and 3 of the instructions to bidders (R. p. 39), and "new or additional or changed service," of the "kind" described as provided for by paragraph tenth of the contract which the contractor agreed to perform without additional compensation. (R. pp. 57, 58.) The advertisement specifically required the performance of service between the general post office and the several mail stations and the only change that was made by these orders complained of was the requirement of the carriage of part of the mails theretofore carried between the general post office and the mail stations, thereafter between the general post office and the respective mail stations, and contiguous points on the street railways. This was the same kind of service as service contracted for and

was service between points properly designated under the terms of the advertisement and contract referred to.

Practically the same question arose in the cases of *Luther C. Slavens v. The United States* (38 Ct. Cls. 574) and *Samuel G. Proffit v. The United States* (42 Ct. Cls. 248). The cause of action in those cases arose about the same time as the cause arose in the case at bar and involved practically the same question of the duty of the wagon contractor to carry the mails to and from electric car lines upon which service had been established after the beginning of the wagon contract. An appeal in the *Slavens case* was taken to this Court and the judgment below was affirmed here. (196 U. S. 229.)

In the *Slavens case* practically the identical claims relied upon here were insisted upon by the plaintiff in that case. The facts there were that the Postmaster General established mail service on the street car lines in the cities of Boston, Brooklyn, and Omaha after Slavens, the contractor, had begun the performance of his contract, there never having been any such service in those cities previous thereto, and required Slavens to perform service between the post offices, postal stations, and railroad depots and such street car routes at street crossings. It was contended for the claimant in that case that the service was a totally different kind of service than that embraced in and contemplated by either the advertisement or contract. In the case at bar, where the facts are practically of the same nature, the Court of Claims,

contrary to its decision in the *Slavens case*, has stated that the service required herein was of an entirely different nature from that described in the contract. (Op. R. p. 65.) This view is contrary to the views expressed by this court through Mr. Justice Day in delivering the opinion in the *Slavens case*, where the following language upon this point is used:

As to the other claim for extra services: In the stipulation of the contracts, it appears that the contractor was required to perform all new or additional or changed covered wagon mail station service that the Postmaster General should order, without additional compensation, whether caused by change of location of post office, stations or landings, or by the establishment of others than those existing at the time of the contract, or rendered necessary in the judgment of the Postmaster General from any cause, and that officer has the right to change the schedule, vary the routes, increase, decrease, or extend the service without change of pay. It is insisted that these stipulations, properly construed, permit the Postmaster General to require only additional service of the same kind as that stipulated for, and that the carrying of the mails from street cars, where the same might be ordered to be met at crossings, was a new and different kind of service, and was not a change caused by a different location of a post office, station, or landing within the meaning of the contract. But we think this is too narrow a construction of the terms of the agreement. Strictly speaking, the carry-

ing of the mails from the street cars at the crossings is not taking them from the stations, but it practically amounts to the same thing.

* * * But we think the services were within the contract, fairly construed, and do not entitle the contractor to extra compensation. (196 U. S. 236, 237.)

The same questions arose again in the *Proffit case*, *supra*, where the claimant, among other things, claimed that he was improperly required to perform service between street car lines on routes established after the contract was made. Some routes so established were entirely new, being established over the Capital Traction Company, Washington, over which there never had been any service authorized theretofore. The changes largely increased the miles of travel in Baltimore and decreased them in Washington. The Court of Claims held that the service was properly required, citing the *Slavens case* and differentiating the cases from the *Union Transfer case* (36 Ct. Cls. 216) and the *Utah-Nevada-California Stage Company case* (39 Ct. Cls. 420; 199 U. S. 414).

In the case at bar the Court of Claims found that at the time Weighel submitted his bid no mail service in the city of Chicago was being performed to or from street cars by contractors who were performing the same mail service which was bid for by Weighel. This finding does not differentiate the case at bar from the *Proffit case*. Substantially the same question arose in that case. The court found the facts in that case to be that at the time of the advertise-

ment there was no street collection service by the street railways of Baltimore, and the mail which was deposited in the boxes adjacent to the line of the railway was collected by letter carriers or collectors from the various city boxes and was brought by them and deposited in the city post office or branch post office, and from that point such mails were transported to certain designated stations by the street railway company, from whence the contractor was expected to carry them into the city post office. After the advertisement had been issued and the contract made, the system of collecting mail from the street letter boxes and other depositories by carriers and collectors, who were paid out of another appropriation, was changed, and postal car collection boxes were established on the streets; and postal collectors, who were attached to postal cars on the street railways, were detailed boxes, and the existing collectors, instead of carrying the mails collected by them to the post office as theretofore, delivered them to the street cars; and the claimant was required to meet the postal cars of the street railways at street crossings and transport the mail so collected by these various postal collectors to the city post office; all of which service became necessary by reason of the change of collection by letter carriers and collectors, which was in vogue at the time the advertisement was issued, and by the establishment of a new system of collection circuits by street car lines. (42 Ct. Cls. 252, 259.) The

court, in delivering its opinion, stated in regard to this point as follows:

Subsequent to the advertisement and execution of the contract, the collection of mail from street letter boxes and substations by letter carriers and mail collectors, theretofore in vogue, was discontinued and this entire volume of mail was collected by means of postal-car collection boxes installed at various points along the line of the street railways, from which postal collectors attached to postal cars collected the same, and the street cars delivered it to the claimant at various street intersections where he was required to meet them and transport the mail to the general post office. (Finding IX.) It is to be observed, however, that the additional service thus imposed upon the claimant was not different in kind and character from that embraced in the contract. The service differs in every respect from that heretofore declared extra by the court, in that the claimant was not required to visit the collection boxes and carry the mails directly therefrom to the general post office. He was, it is true, required to make many additional trips to and from the street cars and carry a much greater volume of mail to the general post office, but the service was clearly within the requirements of the covered regulation wagon mail-messenger transfer and mail station postal service as contemplated by the contract. (42 Ct. Cls. 248, 259.)

The court below found in the case at bar that the advertisement did not mention service to and from street cars, although the subsequent advertisement did mention specifically such service. (R. p. 62, Finding II.)

This fact is not determinative in favor of the claimant. The inauguration of service on the street cars in the large cities was under development at the time. A contention was made in the *Slavens* and *Proffit* cases that such a service could not be anticipated by the contractor. The report of the Second Assistant Postmaster General for 1899, showing the development of the mail service on the street railway lines during the few preceding years, cites the service of Boston, Mass.; Chicago, Ill.; Philadelphia, Pa.; St. Louis, Mo.; San Francisco, Calif.; and Washington, D. C., showing that any prospective bidder would have been fully advised upon proper inquiry of such gradual development and have taken into consideration the possibilities of such changes during his term of contract. In the case at bar it is specially relevant that the public had knowledge immediately preceding the beginning of the claimant's term of contract that the department was experimenting with the service in Chicago. In the annual report of the Postmaster General for the year ending June 30, 1894, on page 172, the following appears:

Consideration is now being given to the feasibility of utilizing electric and other rapid motor street car lines to facilitate the transportation of mails in the important cities

between the main post offices and branch offices and to and from the railway stations. A plan of this kind would probably include the running of a special car over the several street lines for the exclusive use of the mail service, not only for carrying locked pouches but in which a certain amount of distribution would be possible. Of course such an arrangement could be effected only by the hearty cooperation of the street car companies with the department for the improvement of the service. This office hopes to accomplish some substantial results in the direction indicated within the next year.

In the annual report for the succeeding year, 1895, on page 165, appears the following:

Believing that the department had reached the time when the improved methods of handling mail in cities and in suburban districts had become a postal necessity, the question of utilizing electric and cable cars, as well as other suggested methods, was given very serious consideration and close study, resulting in certain experimental arrangements being made with some electric lines and cable companies in different cities with most satisfactory results. The experiments mentioned were tried first in St. Louis, next in Brooklyn, Boston, Philadelphia, Chicago, and New York.

* * *

In Chicago one car was utilized as an experiment and was found to be of so much service that additional lines were arranged for, which will practically take in at least one-half of the city as soon as cars can be built.

This same statement shows similar developments in Boston, Philadelphia, New York City, and Brooklyn. It was in connection with this same development in Boston, Brooklyn, and Omaha that the claim in the *Slavens* case arose. As hereinbefore stated, it is shown to have been substantially the same claim as that advanced in the case at bar. It was fully and exhaustively presented to this court and earlier to the Court of Claims, and decided in favor of the Government. It can not be said, therefore, that the contractor in this case was taken by surprise or misled as to the probabilities of the service to be performed any more than the contractor for the other cities named.

From the above, and a consideration of the authorities cited, it is clear that the service required was "new or additional or changed" service of the "kind" described and within the terms of its contract, and that the contractor was obliged to perform the same thereunder without additional compensation.

B.

The statement of the postmaster at Chicago was not a warranty that the service would not be required.

We may now consider appellant's claim that the statements made by the postmaster at Chicago to the agent of Weighel constituted a warranty and that the contractor would not be required to perform this service.

The finding on this point is that—

The plaintiff's decedent, through his agent, was informed by the postmaster at Chicago,

who was authorized by the Postmaster General of the United States to give information to bidders, that the bidder obtaining the contract for the performance of mail service * * * would not be required to perform mail service to and from street cars. (R. p. 62, Finding II.)

This representation was not binding upon the United States; the postmaster had not been authorized by the Postmaster General to make any such statement; it amounted to a representation directly contrary to the terms of the advertisement and the contract itself. (*Slavens v. United States*, 196 U. S. 229, 237, 238.)

The authority given the postmaster at Chicago is found in paragraph 27 of the instructions to bidders, as follows:

Bidders are requested to use the blanks for proposals furnished by the department, which may be obtained at the post office on each route herein advertised. For information relative to the service and its requirements, bidders are requested to apply to the postmaster at the city where the service is to be performed. (R. p. 43.)

This manifestly refers merely to information regarding the details of the service and the matters of requirement in connection therewith. There would be a number of these which would not be set out in the advertisement itself and would not be inconsistent with the terms of the advertisement, but which would be important for a bidder to know. The most

important of these items is the schedule indicating the hours of departure of wagons from various points. The advertisement itself merely states the number of trips between the points, but does not give the hours at which the wagons may be required to depart from the several points. Such information as this was contemplated by the paragraph in the advertisement.

A construction of this authority that the postmaster was thereby authorized to vary the terms of the advertisement and the contract itself is an unreasonable one. No such authority can be deduced from the language used or from the reason for its use. All the logic is against such a construction. It is unreasonable to contend that the Postmaster General issued an advertisement including a form of contract under which it was understood by the department that this kind of service could be required of a contractor and under which the courts have uniformly decided that such a service could be required, and in the advertisement give a subordinate officer, the postmaster at Chicago who merely had charge of the conduct of the service in his city, the right and authority to nullify those provisions and to agree with the prospective contractor that if he entered into contract under the advertisement the kind of service which was required in other cities under a similar advertisement and contract would not be required of him.

The appellant relies upon certain cases cited to support his contention of warranty, which are dissimilar in their essential facts from the facts in the case at bar.

United States v. Utah-Nevada-California Stage Company (199 U. S. 414), does not present similar facts. In that case the question was whether the contractor was required to perform service to and from four elevated railroad stations. The advertisement had specifically covered this class of service, but had stated the number of elevated stations to be served as two instead of four, which was the number in fact (p. 424).

The court held that the contractor had a right to presume that the Government knew how many stations were to be served; that the fact was peculiarly within its knowledge; and that it spoke with certainty in the advertisement. These elements clearly differentiate that case from the case at bar, where the advertisement and contract were amply broad to cover the service in question.

The cases of *Hollerbach v. The United States* (233 U. S. 165), *Christie v. The United States* (237 U. S. 234), *United States v. Spearin* (248 U. S. 132), and *United States v. Atlantic Dredging Company* (253 U. S. 1) have no application to this case, unless it can be held that the unauthorized statement of the postmaster at Chicago to Weighel's agent was a warranty to Travis.

C.

The increased expense of service did not give the claimant a right of action.

Appellant argues that the increase in the expense of conducting the service by reason of the Postmaster General's orders complained of excluded the

service from the contract obligations under the doctrine of the *Utah-Nevada-California Stage Company case*.

The facts in that case, upon which the claimant recovered, were, however, very different in their nature from those in the case at bar. In that case the Post Office Department established "a new postal department in the city of New York" which was decided to be, in effect, a duplication of the general city post office and vastly increased the wagon contractor's work, requiring service, as it did, to two general post offices instead of one which was in existence at the time of the advertisement. (199 U. S. 423, 424.) The court there said that the "limit of reasonable requirement under the new and additional service clause was exceeded and the service required can not be held to be within the terms of the contract."

The mere fact that the contractor's service is greatly increased by orders issued under the authority of the contract gives no right of action against the Government. This has been clearly settled in the cases that have come to this court. In the case of *Union Transfer Company v. The United States* (36 Ct. Cls. 216) the Post Office Department increased the number of "receiving stations" in Philadelphia, Pa., by the establishment of 17 additional, and increased the number of "branch post offices" by increasing the number from 4, existing at the time the contract was entered into, to 12, during

the contract period, thus greatly increasing the cost of performance of service. The court held that, while service to and from the "receiving stations" was not within the terms of the contract, the service to and from the "branch post offices" was "new or additional service" or service of the "kind" described in the contract, and, although it increased the cost of service greatly, the contractor, nevertheless, had been properly required to perform it without additional compensation.

CONCLUSION.

It is respectfully submitted that, under either theory of the case presented, the appellant should not recover; and the judgment of the Court of Claims dismissing his petition was correct and should be affirmed.

FRANK DAVIS, Jr.,

Special Assistant to the Attorney General.

WM. D. HARRIS,

Attorney.

JOSEPH STEWART,

Special Assistant to the Attorney General.



33

APPEAL from a judgment of the Court of Claims, against the claimant, in an action to recover for extra mail-carriage service.

Mr. A. C. Travis and Mr. Burt E. Barlow, with whom Mr. A. R. Serven was on the brief, for appellant.

Mr. Assistant Attorney General Lovett, with whom Mr. Frank Davis, Jr., and Mr. Joseph Stewart, Special Assistants to the Attorney General, and Mr. Wm. D. Harris were on the brief, for the United States.

MR. JUSTICE CLARKE delivered the opinion of the court.

This is an appeal from a judgment of the Court of Claims in favor of the United States.

On January 17, 1895, appellant's decedent, William Weighel, entered into a written contract with the United States for the transportation of mail on route No. 235,001, "being covered regulation wagon mail messenger, transfer, and mail station service," between designated points in the City of Chicago, Illinois, for the term of four years, commencing on July 1, 1895.

On February 6, 1895, Ezra J. Travis contracted in writing with Weighel to perform the entire contract for somewhat less than the latter was to receive from the Government. The Postmaster at Chicago and the Postmaster General were advised of this subletting, and for the entire four years during which Travis performed the contract he was recognized by the Post Office Department as a subcontractor, performing Weighel's obligations under the contract. The full amount stipulated for in the contract was paid by the Government, all payments being made to Weighel, who made settlement with Travis.

At the time Weighel bid on the route no mail service was being performed by contractors in Chicago to and from street cars, and the advertisement of the Post Office Department for proposals did not mention such service,

125.

Opinion of the Court.

but, on the contrary, before he made his bid, Weighel was notified by the Postmaster at Chicago, who was authorized by the Postmaster General to give information to bidders, that the successful bidder would not be required to perform such service.

On November 14, 1895, about four months after Travis, as subcontractor, entered upon the performance of the contract, and again on May 12, 1896, and on February 27, 1897, and May 3, 1897, the Postmaster General issued orders requiring the contractor to perform specified mail service to and from street cars in Chicago. The Government claimed that this new service was within the scope of Weighel's contract, but he claimed that it was not, and performing it under protest he notified the Government that compensation therefor would be demanded. Travis performed all of the extra service for Weighel and the Court of Claims found that he was obliged to employ twenty-four men, four double vans and seven single wagons to perform the service which had previously been performed by four drivers and four single wagons, and that the reasonable value of the extra service imposed by the orders of the Postmaster General was \$52,327.60.

This suit, brought by Weighel to recover the fair value of the extra service rendered, has since his death been prosecuted by his executor.

The Court of Claims decided that because Travis performed all of the extra service which was the subject of the suit, Weighel had no interest in the subject-matter of it and dismissed the petition.

We agree with the lower court that the contention of the Government cannot be allowed, that the extra service rendered was within the paragraph of the contract providing that the contractor is "to perform all new or additional or changed covered regulation wagon mail messenger, transfer, and mail station service that the Postmaster General may order in the City of Chicago, Illinois,

during the contract term, without additional compensation." This paragraph is in precisely the terms quoted and considered in *United States v. Utah, Nevada & California Stage Co.*, 199 U. S. 414, which on this point plainly rules the case before us and gives the appellant a right of action unless it is defeated by the fact that Travis instead of Weighel performed the service.

The finding of the Court of Claims is that while the Government had notice that Weighel had sublet his contract and while in practice it recognized Travis as a subcontractor, yet no copy of the subcontract was filed with the Department, as is provided for in c. 116, 22 Stat. 53, 54, but that, on the contrary, Travis certified to the Postmaster General that he did not intend that "the contract should be filed for recognition by the Department or as a lien against the pay of the contractor." Thus, while the Government accepted service from Travis, it consistently retained its contract relation with Weighel during the entire four years. Three of the four orders for the extra service were addressed to Weighel and the second of the four, which was addressed to Travis, probably by inadvertence, contained, as each of the others did, a requirement that the "contractor" should perform the service designated without additional pay, "in accordance with the terms of his contract." All payments were made to Weighel and it was from him that the protest came against being required to perform the extra service and the notice that extra pay would be demanded for it. While Travis was called a subcontractor, he was treated by all concerned throughout the entire transaction as if he were (and he seems to have so regarded himself) a mere agent, performing for Weighel. The Government did not have, and did not by any implication recognize, any contractual relations whatever with Travis, and if he had failed in performing it would not have had any right of action against him, for the subletting of such a contract

was forbidden by statute, except with the consent in writing of the Postmaster General, which was never given. (c. 107, 20 Stat. 62, § 2.) Weighel was the only person legally bound to perform the original contract; it was from him that the Government demanded the extra service, and under the facts found by the lower court the obligation to pay for that service was to him, whether he performed it personally or through another. The Government accepted performance of the extra service by Travis precisely as it accepted performance by him of the obligation under the original contract and the law requires payment to Weighel for the former as much as it required the payment which was made to him for the latter.

It results that the judgment of the Court of Claims must be reversed and the case remanded for further proceedings in conformity with this opinion.

Reversed.

HUNT, EXECUTOR OF WEIGHEL, v. UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 38. Argued October 17, 1921.—Decided November 7, 1921.

1. *United States v. Utah, Nevada & California Stage Co.*, 199 U. S. 414, followed to the effect that a general stipulation in a mail-carriage contract obliging the contractor to perform new, additional or changed service without additional compensation, when ordered by the Postmaster General, does not authorize the exaction without pay of a heavy and expensive service not within the contemplation of the parties. P. 127.
 2. Where a contract for mail-carriage was sublet, without filing a copy of the sub-contract under c. 116, 22 Stat. 54, or obtaining the written consent of the Postmaster General, required by § 2, c. 107, 20 Stat. 62, and the Government, though accepting the service performed by the subcontractor, neither had nor recognized any contractual relation except with his principal, treating the former as the agent of the latter, an action in the Court of Claims for extra service exacted by the Government over his protest, but performed by the subcontractor, was properly brought by and in the name of the contractor. P. 128.
- 55 Ct. Clms. 77, reversed.